IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-512

ROBERT MORFORD, Acting Warden,
Tennessee State Penitentiary,
Petitioner,

vs.

OTIS ELLIOTT,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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The petitioner, Robert Morford, former Acting Warden of the Tennessee State Penitentiary, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit filed on July 6, 1977, reversing the judgment of the United States District Court for the Eastern District of Tennessee, Southern Division entered on April 19, 1976 and remanding the case to the United States District Court to conduct an evidentiary hearing on the issue of the voluntariness of the respondent's confession.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals dated May 22, 1974, reversing the respondent's conviction is unpublished and is reproduced as Appendix A. The opinion of the Tennessee Supreme Court reversing the decision of the Tennessee Court of Criminal Appeals and reinstating the respondent's conviction is reported at 524 S.W.2d 473. The opinion of the United States District Court for the Eastern District of Tennessee dated April 16, 1976 denying the respondent's petition for writ of habeas corpus is unreported and is reproduced as Appendix B. The opinion of the United States Court of Appeals for the Sixth Circuit dated July 6, 1977, reversing the judgment of the United States District Court, is unreported and is reproduced as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 6, 1977. This petition for a writ of certiorari is timely filed within ninety (90) days of that date pursuant to 28 U.S.C. § 2101(c). Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a state prisoner who has been afforded a fair opportunity to challenge the voluntariness of his confession in state court should be allowed to attack the state courts' findings in a collateral proceeding pursuant to 28 U.S.C. § 2254.

2. Whether a United States District Court, after reviewing the entire record of the state proceedings, including the transcript of the hearing on a state prisoner's motion to suppress his

confession and the opinions of the state appellate courts concerning the voluntariness of this confession, was entitled to presume that the findings of the state courts were correct pursuant to 28 U.S.C. § 2254(d).

3. Whether the facts contained in the records of the state proceedings which were filed with the United States District Court in this case show that the issue concerning the voluntariness of the respondent's confession was fully and finally resolved in state court.

4. Whether the facts contained in the records of the state proceedings which were filed with the United States District Court support the finding that the respondent's petition was voluntary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The power of a United States District Court to grant a writ of habeas corpus is codified in Title 28 of the United States Code which provides in pertinent part:

> § 2254(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair and adequate hearing in the State court proceedings;
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceedings in which the determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or un-

less the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

A

Proceedings in the State court

The respondent and four of his companions were arrested on July 19, 1972, several hours after the Oakdale Superette located in Bradley County, Tennessee was robbed and its owner killed. During the next several days following his arrest, the respondent gave a detailed oral confession concerning his involvement in the armed robbery and murder. On July 22, 1972, the Bradley County, Tennessee grand jury indicted the respondent for first degree murder and murder while perpetrating an armed robbery.

On October 24, 1972, the respondent filed a motion to suppress his oral statements alleging that they had been obtained in violation of his constitutional rights. The trial court conducted an evidentiary hearing on this motion on October 24, 1972, and again on November 8, 1972, during which twelve witnesses testified. The transcript of these hearings is reproduced as Appendix D. The trial court did not make a specific finding concerning the voluntariness of the respondent's confession at the conclusion of the proof on November 8, 1972, but did sever the trial of the respondent and one codefendant from the other three codefendants.

The trial of the respondent and his codefendant commenced on March 20, 1973. Prior to the empanelling of the jury, the trial court heard further argument concerning the respondent's motion to suppress his confession. After this argument and a tender of proof by the respondent's attorney, the trial court overruled the respondent's motion to suppress his confession. The trial was then commenced and on March 21, 1973, the respondent and his codefendant were found guilty of murder in the first degree and were sentenced to ninety-nine years in the state penitentiary.

The respondent perfected an appeal, and on May 22, 1974, the Court of Criminal Appeals reversed his conviction on the ground that the respondent was entitled to obtain a copy of the transcript of the hearings on his motion to suppress his confession prior to the trial. In its opinion, however, the Court considered the issue of the voluntariness of the respondent's confession and found that the evidence in the record fully sustained the trial court's finding that the respondent's confession was voluntary.

Both the respondent and the State of Tennessee filed petitions for a writ of certiorari in the Tennessee Supreme Court. While the respondent again raised the issue of the voluntariness of his confession in this petition, the Tennessee Supreme Court limited its review to other issues. On May 27, 1975, the Tennessee Supreme Court reversed the judgment of the Court of Criminal Appeals and reinstated the respondent's conviction.

B

Proceedings in the Federal Courts

On November 3, 1975, the respondent filed a *pro se* petition for a writ of habeas corpus in the United States District Court

for the Eastern District of Tennessee. The petitioner answered this petition on November 24, 1975, and at that time supplied the District Court with verbatim transcripts of the entire state proceedings involving the petitioner. The District Court then appointed counsel to represent the respondent, and on March 15, 1975, a supplemental habeas corpus petition was filed.

On April 19, 1976, the District Court declined to grant the respondent habeas corpus relief after reviewing the pleadings filed by the parties as well as the entire record of the state proceedings. The respondent perfected an appeal to the United States Court of Appeals for the Sixth Circuit. On July 6, 1977, the Court reversed the decision of the District Court and remanded the case for an evidentiary hearing on the issue of whether the respondent's confession was voluntary.

C

Statement of Facts Adduced on Motion to Suppress

The respondent was arrested on July 19, 1972, several hours after the Oakdale Superette had been robbed and its owner killed. During the next several days following his arrest, he gave a detailed, oral confession concerning his involvement in the armed robbery and the murder. On October 24, 1972, he filed a motion to suppress these statements alleging that they had been obtained in violation of his constitutional rights. The state trial court conducted an evidentiary hearing on this motion on October 24, 1972 and again on November 8, 1972 and on March 20, 1973 overruled the motion to suppress.

During the hearing on his motion to suppress, the respondent stated that he was a diabetic but admitted that he did not inform anyone of his condition until he was in jail when he told

a trusty he needed medicine. (B.E. 75-78).* He also admitted the police took him to a hospital while he was in jail and that the doctor, after performing several tests, told him that he did not need medication. (B.E. 80-81 and 98). There is evidence in the record that the respondent refused to take the insulin provided for his use because he thought it was poison. (B.E. 96-97).

The respondent claimed that he was interrogated briefly on the day he was arrested, (B.E. 79), and again on the following day. (B.E. 79 and 112). He admitted that on the day following his arrest, he sent several messages to Deputies Neeley and Helton asking to see them. (B.E. 113). He claimed that the police took him from his cell on the second night he was in jail and that he was placed in an automobile with Deputies Neeley and Moore. (B.E. 83). He testified that he was repeatedly threatened and eventually taken to a cemetery where he was hit in the mouth, breaking his denture plate and cutting his lips. (B.E. 87-89). He also stated that he was forced to kneel on the ground with his head near a tombstone while a pistol was discharged close by. (B.E. 90-91).

The respondent testified that he was warned to say nothing, (B.E. 90), and was driven to the city jail where he told police his "side of the thing" which was preserved on tape recorder. (B.E. 92). Even though he admitted being advised of his rights when he was first questioned, (B.E. 105), he could not remember whether he was advised of his rights when he gave the taped statement. (B.E. 107 and 109). He also claimed that Deputy Neeley told him what to say on the tape, (B.E. 108) and that he made the statement because he was weak from the lack of medicine and because he feared for his life. (B.E. 94).

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* The abbreviation "B.E." refers to the bill of exceptions containing the testimony and statements made during the hearing on the respondent's motion to suppress and on the day of his trial. This portion of the bill of exceptions is included as Appendix D to this petition.

The respondent's family also testified that when they saw him on Sunday, four days after the arrest, his lips were swollen, his shirt was bloody, and his dental plate was cracked. (B.E. 15, 21, 29-31, 62, 380 and 392). The respondent claimed he told his family not to say anything about what had happened because he was afraid of the consequences. (B.E. 103).

The authorities' account of the events leading up to the respondent's confession is diametrically opposed to this account and is corroborated in large part by the respondent's own witnesses. His codefendant's wife testified that she saw the respondent on the day of his arrest and that he asked her to call his mother so he could get his medicine. (B.E. 23). The respondent's mother testified that she took the medicine to the jail the next day, and even though she could not see her son, a black deputy promised to deliver his medicine to him. (B.E. 61-62). The only black deputy in the sheriff's office testified that he went out of his way to give the respondent his insulin on the day his mother brought it to the jail. (B.E. 152). There is also evidence that the trial judge obtained more medicine for the respondent on Saturday, (B.E. 71 and 120), and that at one point, the respondent's mother came to the jail at the request of the police to talk her son into taking the insulin. (B.E. 64).

The respondent was advised of his rights when he was arrested. (B.E. 139). He was noncommittal when he was first questioned, but on the day following his arrest, he sent notes to the deputies saying that he would show them where he and his confederates had abandoned one of the cars used in the robbery. (B.E. 126, 134, 151 and 316-317).

The police did not take the respondent out during the day because they were already looking for the car. (B.E. 146). However, when they were unsuccessful in locating it, they returned to the jail and picked him up. They drove around looking for the car. At no time was the respondent abused or

harrassed. (B.E. 127, 143-144 and 152). Finally the respondent claimed that he did not want to "take it" alone, (B.E. 135), and so the police drove him to the Cleveland City Jail because he did not want the other defendants to know what he was doing. (B.E. 162). There, at approximately midnight, (B.E. 146), after being advised of his rights, (B.E. 126, 150, 166 and 176-177), and sitting in an office containing a large placard enumerating these rights, (B.E. 178), the respondent confessed to his participation in the crime in front of Deputies Neeley and Moore, Detective Dailey and Assistant Attorney General Murphy. (B.E. 125, 146, 162-163 and 177-178). General Murphy testified that the respondent was calm when he gave his statement, (B.E. 178), that he was easy to understand, (B.E. 180), and that there was no blood on his shirt. (B.E. 179). This interview lasted approximately forty minutes. (B.E. 135). As he was being taken back to jail, the respondent asked for a lawyer. (B.E. 137).

There is also evidence in the record that the trial judge met with the respondent several days later in his chambers as the result of another one of his notes. (B.E. 116). In none of these notes nor in any of his subsequent letters to the judge did the respondent mention that he had been physically mistreated. (B.E. 117-118). The judge did not see any evidence of physical abuse when he saw the respondent several days after the alleged beating took place, (B.E. 118), but before he was seen by his family. The trial judge also stated that the respondent was responsive and apparently not suffering from his self-deprivation of insulin when he saw him on July 22, 1973, three days after his arrest. (B.E. 124 and 192).

REASONS FOR GRANTING THE WRIT

This Court has recently reaffirmed that state trial and appellate courts have sufficient sensitivity to federal constitutional rights to render unnecessary providing state prisoners the opportunity to seek collateral review of Fourth Amendment claims pursuant to 28 U.S.C. § 2254. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976). This decision was premised on important policy considerations favoring the finality of criminal adjudications in state courts, promoting comity between state and federal courts, and making the most effective use of limited judicial resources. These considerations support the expansion of the *Stone v. Powell* ruling to petitions filed pursuant to 28 U.S.C. § 2254 wherein state prisoners are collaterally attacking the state court's determination of the voluntariness of their confessions after they were unsuccessful in doing so in state court.

Additional reasons for granting a writ of certiorari in this case are the need to clarify the presumption of correctness embodied in 28 U.S.C. § 2254(d) which attaches to a state court's determination of the merits of a factual issue and the need to determine whether the United States Court of Appeals for the Sixth Circuit erroneously determined that the merits of the dispute concerning the voluntariness of the respondent's confession had not been resolved in the state proceeding and that the determination of the state courts and the District Court that the respondent's confession was voluntary was not fully supported by the record.

ARGUMENT

I

A State Prisoner Who Has Been Afforded a Fair Opportunity to Challenge the Voluntariness of His Confession in State Court Should Not Be Allowed to Attack the State Courts' Findings in a Collateral Proceeding Pursuant to 28 U.S.C. §2254.

This Court's recent opinion in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976), held that a state prisoner who had been afforded a full and fair opportunity to litigate his Fourth Amendment claims in state proceedings would be precluded from collaterally attacking his state conviction by raising similar constitutional claims in federal court pursuant to 28 U.S.C. §2254. This decision rested upon the recognition that: (1) state courts are sensitive to federal constitutional claims, *Stone v. Powell, supra*, 428 U.S. at 493 n. 35, 96 S.Ct. at 3051 n. 35; (2) the exclusion of otherwise probative evidence does not necessarily vindicate, but may impair, the fact finding process at trial, *id.* at 485, 96 S.Ct. at 3047; (3) there should be finality in state criminal trials, *id.* at 491 n. 31, 96 S.Ct. at 3050 n. 31; (4) the friction between state and federal courts should be minimized where possible, *id.* at 491 n. 31, 96 S.Ct. at 3050 n. 31; and (5) efforts to more effectively utilize limited judicial resources should be promoted, *id.* at 491 n. 31, 96 S.Ct. at 3050 n. 31.

While there is not yet a significant amount of federal precedent concerning whether the *Stone v. Powell* rationale should be extended to other constitutional claims raised in habeas corpus proceedings, many scholars have commented that the legal and policy considerations upon which the decision is based may have implications on the availability of habeas

corpus relief that are greater than this Court's disclaimer contained in footnote 37. See Article, The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 213-221 (1976). Further, the concurring opinion of Mr. Justice Powell and the dissenting opinion of Mr. Chief Justice Burger in *Brewer v. Williams*, — U.S. —, 97 S.Ct. 1232, 1245-1247 and 1250-1255 (1977), indicate the Court's desire to explore the propriety of extending the *Stone v. Powell* rationale to claims based upon the Fifth and Sixth Amendments to the United States Constitution.

It must be conceded at the outset that the use of an involuntary or coerced confession in a criminal trial casts doubt upon the fundamental fairness of the trial itself because of the dubious reliability of such a confession. *Jackson v. Denno*, 387 U.S. 382, 84 S.Ct. 1774 (1964), and *Fay v. Noia*, 372 U.S. 429, 83 S.Ct. 822 (1963). However, in light of this Court's recognition that state courts have the responsibility to uphold personal constitutional rights, and in fact have demonstrated an appropriate sensitivity to these rights, it would be appropriate to extend the *Stone v. Powell* rationale to cases such as this one where a state prisoner has fully, albeit unsuccessfully, litigated the issue of the voluntariness of his confession in the state trial and appellate courts. Such an extension would also be particularly appropriate in cases such as this one where the record contains overwhelming evidence of the defendant's guilt.

The extension of *Stone v. Powell* to habeas corpus petitions raising Fifth and Sixth Amendment Claims where the federal courts have determined that the state prisoner was afforded a full and fair opportunity to raise these issues will also serve to promote policies which this Court recognized as important in the context of preventing collateral attacks on state convictions based upon the Fourth Amendment.

II

A United States District Court, After Reviewing the Entire Record of the State Proceedings, Including the Transcript of the Hearing on the State Prisoner's Motion to Suppress His Confession and the Opinions of the State Appellate Courts Concerning the Voluntariness of the Prisoner's Confession, Is Entitled to Presume That the Findings of the State Courts Were Correct Pursuant to 28 U.S.C. § 2254(d).

In response to this Court's decision in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745 (1963), and in light of the increasing number of habeas corpus petitions being filed by state prisoners, the Congress amended 28 U.S.C. § 2254 in 1966 by adding subsections "(d)", "(e)" and "(f)". Public Law 89-711 [1 U.S. Cong. & Ad. News 1290-1293 (89th Cong. 2d Sess. 1966)]. By operation of these provisions, a District Court may presume that a state court's determination of a factual issue which is evidenced by reliable and adequate written indicia is correct unless it finds that one of the eight conditions enumerated in 28 U.S.C. § 2254(d) exist. One of the purposes for the enactment of 28 U.S.C. § 2254(d-f) is contained in the report of the Habeas Corpus Committee to the Judicial Conference of the United States:

> It is the opinion of your committee that the proposed legislation, if enacted, will be a strong inducement to the States that have not already done so to provide adequate post conviction remedies and procedures and to make and keep available records of evidentiary matter in criminal and post conviction proceedings, and to the State courts in criminal proceedings to safeguard the constitutional rights of defendants.
>
> Senate Report 1797, 3 U.S. Code Cong. & Ad. News, 3663, 3665 (89th Cong. 2d Sess. 1966).

The United States Court of Appeals for the Sixth Circuit predicated their opinion upon an erroneous application of 28 U.S.C. § 2254(d)(1) because their conclusion that the absence of specific findings of fact by the state trial court on the issue of the voluntariness of the respondent's confession indicated that this issue was not resolved in the state court.

This conclusion was wrong for two reasons. First, the verbatim transcript of the respondent's trial in state court, including the hearing on the respondent's motion to suppress his confession together with the written opinions of the state appellate courts constitute "reliable and adequate written indicia" of the state court's decision and of the fact that the merits of the factual dispute were resolved in the state proceedings. Second, the United States Court of Appeals erred by holding that the United States District Court could not rely upon the presumption of correctness contained in 28 U.S.C. § 2254(d) because the state trial court did not make specific findings of fact on the issue of the voluntariness of the respondent's confession. This Court has ruled that a state trial judge is not required to make formal findings of fact or write an opinion in order to comply with the rule that a judge must determine that a confession was freely and voluntarily given before the confession is submitted to the jury. *LaVallee v. Deile Rose*, 410 U.S. 690, 93 S.Ct. 1203 (1973) and *Sims v. Georgia*, 385 U.S. 538, 544, 87 S.Ct. 639, 643 (1967).

III

The Records of the Respondent's Trial and Appeal in the State Courts Show With Unmistakable Clarity That the Trial Court and the Court of Criminal Appeals Found That the Respondent's Confession Was Voluntary.

In *Sims v. Georgia, supra*, this Court held that a trial judge is only required to determine with unmistakable clarity that a

defendant's confession is voluntary before it is submitted to the jury. This record shows that this was done by the trial court on March 20, 1973 when the respondent's motion to suppress his confession was overruled. (BE. 192-196). When the Tennessee Court of Criminal Appeals reviewed the respondent's conviction, they found that there had been a finding by the trial court that the respondent's confession was voluntary:

> Upon consideration of all the testimony given at the suppression hearing, the trial judge was of the opinion that these two defendants knowingly and understandingly and voluntarily made their respective confessions without any intimidation or abuse or mistreatment or coercion and after being fully advised of their rights.
>
> *Elliott and Mitchum v. State of Tennessee*, Bradley No. 73 (Tenn. Crim., filed May 22, 1974) at p. 7.

Such interpretations by state appellate courts of the decisions of state trial courts concerning the voluntariness of a state prisoner's confession have been given great weight by this Court. *Swenson v. Stidham*, 409 U.S. 224, 230, 93 S.Ct. 359, 363 (1972).

This Court has recognized that a federal judge may legitimately presume, even in cases where there has been no formal articulation by the state trial court, that the state trier of fact applied the correct standards of federal law to the facts in absence of any reason to suspect that incorrect standards were applied. *Townsend v. Sain, supra*, 372 U.S., at 314-315, 83 S. Ct. at 757-758 (1963). *See also LaVallee v. Della Rose, supra*, 410 U.S. at 694, 93 S.Ct. at 1203.

In light of the statements of the trial court and the opinion of the Tennessee Court of Criminal Appeals which were included in the record filed in the District Court, the District Court could

properly find that the state courts had decided with unmistakable clarity that the respondent's confession was voluntary and, absent proof to the contrary, that this finding was premised upon appropriate constitutional principles.

IV

The Facts Developed at the Hearing on the Respondent's Motion to Suppress His Confession Fairly Support the State Courts' Finding That the Respondent's Confession Was Voluntary.

The United States Court of Appeals also concluded that the determination of the state courts that the respondent's confession was voluntary was not fairly supported by the record. This conclusion is not based upon a fair reading of the testimony adduced at the hearings on the respondent's motion to suppress his confession. The record developed in this particular case shows that the respondent's confession was voluntary under the "totality of the circumstances." *See generally Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973).

The respondent's attack on the voluntariness of his confession is based upon four claims: (1) the police did not advise him of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); (2) he was prevented from consulting with counsel prior to confession; (3) the police deprived him of insulin; (4) the police beat him while he was in custody.

A fair reading of the state record fails to support these claims. Rather, the statements of the officers, the respondent's witnesses, and the trial judge show that the respondent voluntarily confessed because he did not want to "take it" alone. (BE. 135). The record shows that he was advised of his rights numerous times prior to his confession. (BE. 105, 126, 150, 166 and 176-

178). The record also shows that the authorities took extraordinary steps to make sure that the respondent received the insulin he claimed he needed, even to the extent of sending him to the hospital and asking his mother to come to the jail to convince him to take the insulin after he refused to do so. (BE. 61-62, 64, 71, 120 and 152). The trial judge also stated that he had seen no evidence of any impairment of the respondent's faculties when he personally met with him during this time. (BE. 184 and 192). The record also shows that the respondent asked for an attorney only after he had confessed. (BE. 137). Finally, the testimony of the police, as well as that of the assistant district attorney who was present at the time the confession was given and the trial judge refute the respondent's claim that he was physically abused prior to making his confession. (BE. 117-118, 127, 143-144, 152 and 179).

This testimony, which was accredited by the state trial court, the Tennessee Court of Criminal Appeals, and the United States District Court, provides an ample basis for the conclusion that the respondent's confession was voluntary in light of all the circumstances surrounding his questioning while in custody.

V

No Worthwhile Purpose Would Be Served by Requiring the United States District Court to Conduct an Evidentiary Hearing in This Case.

In its opinion, reversing the decision of the District Court, the United States Court of Appeals remanded the case with directions that an evidentiary hearing be held on the issue of the voluntariness of the respondent's confession. In light of the completeness of the state record of the hearing on the respondent's motion to suppress his confession, no useful purpose will be accomplished in requiring another evidentiary hearing almost five

years after the original hearings were conducted. In addition to this, there is also the distinct possibility that a second evidentiary hearing would only serve to cloud the issue because of the potential unavailability of witnesses both for the State and the respondent and because of the witnesses' clouded memories due to the passage of time.

It is difficult to conceive of any additional proof that would be put on in a hearing at this time that was not fully developed five years ago. The respondent has already presented all his proof, with the exception of his physician, the substance of whose testimony was considered by the trial judge, and the State has already produced all its witnesses. These witnesses were subjected to cross-examination, and the trial judge was able to observe their demeanor in order to pass upon their credibility. Thus any testimony adduced at another evidentiary hearing would be repetitious and would unnecessarily burden the resources of the State and the District Court.

In none of these proceedings has the respondent alleged any new facts concerning the manner in which his confession was obtained which were not thoroughly explored in state court. Thus, the only benefit to the District Court in conducting another evidentiary hearing would be the opportunity for the judge to pass upon the credibility of the witnesses for himself. As long as the Court has determined that the respondent has been afforded a full hearing in state court on the question of the voluntariness of his confession, no provision in 28 U.S.C. § 2254(d) requires another evidentiary hearing be held for this purpose alone. *See Townsend v. Sain, supra,* 372 U.S. at 312-313, 83 S.Ct., at 757.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted and that the judgment of the United States District Court dismissing the respondent's petition be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

The Court of Criminal Appeals of Tennessee
Knoxville, November 1973 Term

Otis Elliott and Jerry Wayne Mitchum, Plaintiffs in Error, v. State of Tennessee, Defendant in Error.	No. 73 Bradley County Honorable James C. Witt, Judge (Murder in the first degree while committing a robbery)

For Plaintiffs in Error:

James G. Cate, Jr.
Cleveland, Tenn. (For Elliott)
(Appointed)

Carl E. Collums
Cleveland, Tenn. (For Mitchum)
(Appointed)

For Defendant in Error:

David M. Pack
Attorney General of Tennessee

William C. Koch, Jr.
Assistant Attorney General
Nashville, Tennessee

Richard A. Fisher
District Attorney General
Cleveland, Tennessee

Opinion Filed: May 22, 1974.

Reversed and Remanded

W. Wayne Oliver
Judge

OPINION

Otis Elliott, alias Otis Ellis and Jerry Wayne Mitchum, alias Jerry Wayne Alexander, the defendants now before this Court, along with Robert T. Arnold, alias Arnold Robarr and William E. Johnson and John W. Sharp, were jointly indicted for the killing of Cornelius C. McClary. The latter three were tried together in a separate trial.

The first count of the indictment charged first degree murder in the usual form, and the second count charged murder committed in the perpetration of a robbery. Represented by separate appointed counsel, Mitchum and Elliott were tried together. Although the trial court's Minutes show that the jury found the defendants guilty of murder in the first degree and fixed their punishment at 99 years in the penitentiary, the Bill of Exceptions shows that the jury actually found both of them "guilty of murder in the first degree committed while engaged in the crime of robbery" and that the trial judge pronounced judgment accordingly.

In case of such a conflict, the recital in the Bill of Exceptions is controlling. *Church v. State*, 206 Tenn. 336, 355, 333 S.W. 2d 799; *Helton v. State*, 195 Tenn. 36, 255 S.W.2d 694; *Bailey v. State*, — Tenn.Crim.App. —, 479 S.W.2d 829. We cannot over-emphasize the duty of trial judges and their clerks to exercise extraordinary care to see that the court's Minutes are prepared with scrupulous regard for absolute accuracy.

We summarize the material evidence, both because Elliott challenges it legal sufficiency and in order to place other contentions of both defendants in proper perspective.

[*2] The deceased was shot to death and robbed in his Bradley County store, called the Oakdale Superette, about 6:30 a.m.

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* Numbers appearing in brackets in text indicate original page numbers of this opinion.

July 19, 1972. He was shot one time with a 12-gauge shotgun and four times with .38 caliber bullets fired by at least two different guns.

Shortly after the store opened that morning, James Brown went in to buy a quart of beer and some cigarettes. Two Negro men, one of whom he positively identified in court and at a line-up as the defendant Mitchum, were standing next to the counter. After getting his quart of beer, Brown approached the counter to pay for it and get his cigarettes. At that time one of the Negro men was behind the counter and one of them told him in hostile terms to leave. Outside he saw a third Negro man, whom he identified in court and at a line-up as the defendant Elliott, who was standing outside and wearing a blue construction hard-type helmet. He also saw and spoke to Ed Lewis who had just driven up. Brown did not see the deceased or any other person in the store except the two Negro men and they ran out shortly after he left.

Ed Lewis arrived as James Brown was coming out of the store. As he started to get a newspaper from a newsstand, two Negro men ran out of the store. A 1971 or 1972 green Ford was parked outside. He went in the store and found the deceased lying dead behind the counter, and called the police.

Sometime prior to the robbery and murder of the deceased, a Bradley County Sheriff's Department detective had received a tip that the store was going to be robbed as soon as it opened, and he had kept the store under surveillance from the top of a nearby store for four nights, ending about 7:00 a.m. July 18th. **[3]** The following morning, utilizing information given this detective previously, an all-points bulletin was sent out for a 1966 T-Bird and a late model Continental Mark III. Later that morning, officers found the Continental parked at William Johnson's trailer home in Charleston, Tennessee. No one was in the car and only Mrs. Johnson was in the trailer. Fresh tracks in the

dew-wet grass led the officers to the next-door home of Willie Massengill. Three Negro men, including the defendants Elliott and Mitchum who said their names were Michael Ellis and Jerry Wayne Alexander, and Robert Arnold (Robarr) were found under Massengill's house, and were arrested and advised of their rights. A search of the area under the house produced more than $2,000 in currency, some of which was blood-stained, three rings and a wallet containing registration papers belonging to the deceased, and a check in the amount of $50 which the deceased had cashed for the payee the night of July 18.

Except with reference to their motions to suppress certain evidence and a line-up, which will be considered later, the defendants did not testify.

Fredia Alexander, Mitchum's wife, testified that his surname is Alexander; that he called her the day he was arrested and she went to the jail but was not permitted to see him; that she saw Elliott the next day and he had blood on his tee shirt and one of his teeth was out and his lip was swollen.

Elliott's mother testified that he is a diabetic and takes insulin once a day; that he wears a denture, a partial upper plate, which she saw in perfect condition the day before his arrest; that after his arrest she was not permitted to see him until the following Sunday and then observed that his upper **[4]** lip was cut and swollen and his denture was cracked and broken. His grandmother also said there was nothing wrong with his denture the day before his arrest. One of Elliott's friends testified he had about $120 the night before his arrest and that she gave him an additional $50 which he needed for a payment on an automobile.

After an extensive pre-trial hearing, the trial court overruled the defendants' motions to suppress and exclude their extra-judicial inculpatory statements which they claimed were the

result of violence and threats and were not freely and voluntarily made.

Thus, at the trial Detective Wayne Neeley, of the Bradley County Sheriff's Department, the same officer who was tipped off that the Superette was going to be robbed and watched it for four nights as above indicated, testified that he was present at the city jail when Elliott related that he and another man were picked up in Chattanooga on the night of the 18th about midnight, and were told that a big deal was going and were asked if they would like to make some money; that they came to Cleveland and changed clothes and prepared for the robbery in a residence or place of business on Inman Street belonging to someone named Larry; that they were in two cars, and he drove one of them to a Chevron filling station just off of Keith Street and waited there for the others; that when they rejoined him shortly thereafter, they all drove to a place near where Peerless Road goes under I-75, and there one car was abandoned and they all went in the other car to William E. Johnson's residence in Charleston, and that he and two of the others were placed under the house next door; and that he was to receive $15,000 for driving the car. Detective Neeley also testified that Elliott had sent **[5]** several notes to him by the jailor saying that he wanted to talk to him; that he (Neeley) and another officer took Elliott out of the jail about 8:30 one night and kept him out until about 12:30 or 1:00 a.m. because he had previously stated he could show them where the car was abandoned, which the officers had been unable to locate; that Elliott was not taken to a cemetery (as he claimed), but during the excursion searching for the car they drove by a cemetery located near where he was arrested; that he did not fire a gun at or beside Elliott (as he claimed); and that he was not struck or threatened in his presence (as he also claimed). Cleveland Policeman John Dailey testified that he drove the car when he and Detective Neeley took Elliott out of the jail, and that he was not threatened in any way; and that when they

returned to the city jail the District Attorney General was called and when he arrived Elliott made a lengthy statement concerning his involvement in this crime.

Detective Neeley also testified that he was present on Saturday morning following his arrest when Mitchum gave a statement in his office; that Mitchum related he and Elliott were picked up in Chattanooga and were supposed to get $15,000 to help with a big job; that they came to Cleveland and went to a place on Inman Street and changed clothes and then drove in two vehicles to the vicinity of the Oakdale Superette; that three of them got out and entered the store one at a time as if they were customers; that he had a shotgun and the other two had revolvers; that they approached the deceased with the sole purpose of taking his automobile keys; that a fight occurred when the deceased went for his own revolver, which was under the counter; that the deceased was shot several times and he also shot him with the shotgun; that after they had to shoot him, they got what **[6]** money they could out of his pockets; that about this time another defendant came to the door and told them to hurry and they ran out of the place and got into one of the vehicles and drove north on Keith Street and made a turn at the Chevron filling station and followed Mouse Creek Valley Road to the underpass where Peerless Road goes under I-75; that they abandoned a Buick Riviera at that point and got into the other vehicle and went to Charleston and were placed under a house there; and that during the fight with the deceased, he was wearing a yellow hat which fell off. Neeley also testified that he found a yellow hard hat at the scene; that on the day of his arrest Mitchum asked him for an attorney and he was advised the court would appoint one for him; that Mitchum stated he would get a Mr. Brown from Chattanooga to represent him; and that Mitchum did not request an attorney before making his statement. Policeman Dailey also testified that Mitchum did not make any request for an attorney in his presence.

We have reviewed the entire record of the suppression hearing, including the testimony of the officers involved, the former District Attorney General, Mitchum's persistent denial of making any confession or inculpating statement to the officers, and Elliott's testimony. He claimed that the night the officers removed him from jail and took him for a drive he was weak and dizzy and drowsy from lack of insulin for his diabetic condition; that they intimidated and frightened him with talk about a shotgun in the car and asked him where he wanted his body sent; that they took him to a cemetery and one of the officers struck him and they tried to get him to run so they would have an excuse to shoot him, and another one of them struck him in the mouth and broke his partial denture, and then they pushed him down **[7]** beside a tombstone and asked him what happened to the guns used in the robbery and he kept teiling them he didn't know and wanted a lawyer and that he wasn't feeling good, and that Neeley then fired an automatic pistol by his head and told him the next shot would go into his head; and that upon returning to the jail they promised to help him get some medicine and the District Attorney General came in and asked him what happened; that he was upset and afraid "they was going to carry me back out there and so I just started, I told them my side of the thing"; that a tape recording was made of his statement and he doesn't recall what he said and told that story just to get relief; and that although he was advised of his rights at the time of his arrest he stated he could not say whether those rights were or were not repeated prior to making his taped statement. The Buick Riviera had been found abandoned near the I-75 underpass and had been pulled in by a city policeman unaware that it had been involved in this crime. When they took Elliott out of the jail to help look for the abandoned car he directed them to the area of the Chevron filling station and identified it as the place where the car was left.

Upon consideration of all the testimony given at the suppression hearing, the trial judge was of opinion that these two de-

fendants knowingly and understandingly and voluntarily made their respective confessions without any intimidation or abuse or mistreatment or coercion and after being fully advised of their rights.

The trial court's determination with reference to compliance with the *Miranda* mandate by interrogating officers, and as to the voluntariness of statements made by the accused during custodial interrogation, is conclusive on appeal unless **[8]** the appellate court finds that the evidence touching those questions preponderates against the trial judge's findings. *Lloyd v. State*, 223 Tenn. 1, 440 S.W.2d 797; *Mitchell v. State*, 3 Tenn. Crim.App. 494, 464 S.W.2d 307. Upon appeal, the defendant has the burden of showing that the evidence preponderates against such a finding by the trial judge. *Wooten v. State*, 203 Tenn. 473, 314 S.W.2d 1; *Mitchell v. State*, supra. In this case the evidence fully sustains the trial court's findings. Moreover, as we have also noted, the insistence of the defendant Mitchum was that he did not at any time make any inculpatory statements to the law enforcement officers.

Considered in the light of the rules by which we are bound in reviewing the evidence in criminal cases when its sufficiency to warrant and sustain the verdict of the jury is challenged, *Jamison v. State*, 220 Tenn. 280, 416 S.W.2d 768; *Webster v. State*, 1 Tenn.Crim.App. 1, 425 S.W.2d 799; *Chadwick v. State*, 1 Tenn.Crim.App. 72, 429 S.W.2d 135, manifestly these defendants have failed to carry their burden of demonstrating here that the evidence preponderates against the verdict and in favor of their innocence. Their guilt was clearly established.

However, the rule which places upon the plaintiff in error the burden of demonstrating his innocence on appeal by a preponderance of the evidence only applies where he has had a fair and impartial trial, and one free from prejudicial error. *Pearson v. State*, 143 Tenn. 385, 389, 226 S.W. 538. In this

case the defendants did not have a fair and impartial trial free from prejudicial error. We consider first the errors requiring reversal. The defendants' complaint that the trial judge erroneously overruled their respective motions to furnish them transcripts of the suppression hearing, and a transcript of the prior trial of their co-defendants must be sustained.

[9] By Chapter 221 of the Public Acts of 1965 (TCA §§ 40-2029—40-2043), the Legislature of this State established a system to provide for court reporters and official transcripts in felony and habeas corpus cases. TCA § 40-2037 empowers the trial court to direct the official court reporter to furnish an indigent defendant an official trial transcript if requested. And TCA § 40-2040 positively enjoins trial judges to provide indigent defendants with a free transcript for appeal.

While those statutes expressly apply only to transcripts for the purpose of appeal, *Brown v. State*, 1 Tenn.Crim.App. 739, 450 S.W.2d 35, in the light of decisions of the United States Supreme Court and other federal courts reviewed hereinafter it is now incontestable that the right of an indigent to a free transcript is not limited to purposes of appeal. Indeed, the Legislature recognized this by extending the right to indigent prisoners filing legally cognizable petitions under the Post-Conviction Procedure Act. TCA § 40-3813.

The suppression hearing was held in two stages, on October 24, 1972 and November 8, 1972. The order of the trial court overruling the motion for a transcript of that hearing and for a transcript of the trial of the co-defendants was made and entered on March 6, 1973. As the reason therefor, that order recited: "After hearing the proof in the cause and considering the affidavits and exhibits filed, the Court overruled the motion, from which defendant excepts." Although this order referred only to Mitchum's motion, and no order appears specifically overruling Elliott's like motion, the obvious fact remains that the court intended to and did overrule both motions.

[10] The trial of these defendants was March 20 and 21, 1973. On the day before the trial began, Mitchum moved for a continuance because he had not been furnished a transcript of the suppression hearing nor a transcript of the prior trial of the other co-defendants, averring that he "has thereby been deprived by state action of a material aid in his defense." In overruling the continuance motion, the court made no reference to the transcript of the suppression hearing, but said with reference to the transcript of the prior trial of the other co-defendants: "Transcripts of the prior, very lengthy trial has not as yet been prepared and the Court, having heard the prior trial, is of the opinion that the transcript when prepared will be of little benefit to the defendants in this trial."

In *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed. 2d 41 (1967), the United States Supreme Court held that denial of an indigent criminal defendant's request, made when his case was called for trial, for a free transcript of his preliminary hearing, at which the major State witnesses had testified, constituted a deprivation of his constitutional right to equal protection of the laws. A State statute required payment for a prelimiary hearing transcript. Thus, *Roberts v. LaVallee*, supra, requires that criminal preliminary hearing proceedings be recorded and that a free transcript thereof be made available to an indigent defendant for use at trial. *Conley v. Dauer*, 321 F.Supp. 723, 730 (1970).

In *United States ex rel. Wilson v. McMann*, 408 F.2d 896 (2nd Cir. 1969), the Court held that denial of the indigent criminal defendant's request, prior to the commencement of his second trial, for that part of the transcript of his first trial which contained the testimony of the undercover agent who [11] allegedly purchased narcotics from him, and of three other witnesses who corroborated the undercover agent, deprived the defendant of his constitutional right to equal protection of the laws. The Court quoted from *Roberts v. LaVallee*, supra, the

general statement, well recognized and understood, that "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."

In *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971) the trial court denied the indigent defendant's motion for a transcript of his first trial, which ended in a mistrial, for use in his re-trial. It appeared, as the Court noted, that the court reporter, who was acquainted with and a friend of all the attorneys in the case, would at any time have read back to defense counsel his notes of the mistrial, well in advance of the second trial, if counsel had so requested. But the Court reiterated the settled law with reference to the right of an indigent criminal defendant to a transcript of prior proceedings essential to his effective defense or appeal:

> "*Griffin v. Illinois* [351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956)] and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. The question here is whether the state court properly determined that the transcript requested in this case was not needed for an effective defense.
>
> "In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection [12] with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. Mr. Justice Douglas

suggests that the North Carolina courts refused to order a transcript in this case both because petitioner failed to make a particularized showing of need, and because there were adequate alternative devices available to him.

"We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. As Mr. Justice Douglas makes clear, even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses."

So, it is no longer open to question that an indigent defendant is entitled as of right to a transcript of so much of a prior hearing or proceeding involving him as will provide him with the same basic tools of adequate defense as are available for a price to non-indigent criminal defendants, unless he has available an alternative substantially equivalent to a transcript. In the case before us there is no suggestion that any such alternative was available to these defendants.

"A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight." *Britt v. North Carolina*, supra. The burden is on the State to show that only a portion of the transcript or an alternative will suffice. *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971). Nor is it permissible to make any distinction between felonies or misdemeanors. *Mayer v. City of Chicago*, supra.

Applying the long established constitutional principles so succinctly summarized in *Britt*, supra, and in the other cases **[13]** referred to, the ineludible conclusion is that these defendants were also altogether within their constitutional rights in requesting a copy of the transcript of the prior separate trial of their co-defendants, or at least the portion thereof containing the testimony of 10 prosecution witnesses who testified both in that case and in this one.

Without the transcript of the hearing to suppress their confessions, and without at least the portion of the transcript of the prior trial of their co-defendants just indicated, reason compels the conclusion that these defendants were deprived at their trial of the best possible means of testing the credibility of the key prosecution witnesses by cross-examination to expose any contradictions or irreconcilable inconsistencies in their former testimony. Unarguably, denying them those transcripts prejudicially deprived them of a universally recognized powerful weapon of defense. That was a plain and palpable violation of their Fourteenth Amendment rights of due process and equal protection of the laws and was reversible error.

We find no merit in the defendants' complaint about the action of the trial judge in overruling their motions to suppress and exclude their pre-trial confessions. The trial court's determination with reference to compliance with the *Miranda* mandate by interrogating officers, and as to the voluntariness of statements made by the accused during custodial interrogation, is conclusive on appeal unless the appellate court finds that the evidence touching those questions preponderates against the trial judge's findings. *Lloyd v. State*, supra. Upon appeal the defendant has the burden of showing that the evidence preponderated against such **[14]** a finding by the trial judge. *Wooten v. State* 203 Tenn. 473, 314 S.W.2d 1; *Mitchell v. State*, 3 Tenn. Crim.App. 494, 464 S.W.2d 307.

Each of the defendants assigns error directed to the action of the trial court in overruling their motions for a change of venue. Those motions were predicated upon allegedly prejudicial pre-trial publicity given by news media to the crime and the prior separate trial of the other co-defendants, resulting in widespread public attention and excitement. At the outset, the defendants confront an insurmountable obstacle. We have here an almost exact repetition of what occurred in the same court in *Francis v. State*, . . . Tenn.Crim.App. . . . , 498 S.W.2d 107. In the case at hand, the trial court entered two orders regarding the motions for change of venue. The first, combining action on Mitchum's motions for change of venue and for a transcript of the hearing to suppress any extra-judicial statements and for a transcript of the prior trial of the co-defendants, said:

> "This cause came on to be heard heretofore on the defendant's motion for a change of venue and to be furnished a transcript of the hearing on his motion to suppress any statement he made and to be furnished a copy of the transcript of the trial of his codefendants;
>
> "After hearing the proof in the cause and considering the affidavits and exhibits filed, the Court overruled the motion, from which defendant excepts.
>
> "This 6th day of March, 1973."

The second order relating to various motions of both defendants, including change of venue, recited in pertinent part:

> "The Motion for Change of Venue is hereby overruled. Nowhere does the proof, upon the hearing for a Change of Venue, or in the prior trial of this matter, suggest that these defendants cannot receive [sic] a fair trial in this cause."

[15] The purported copies of newspaper articles and affidavits filed with the motions are brought to this Court as part of

the technical record only and are not included in the Bill of Exceptions, nor does it include any evidence heard on the venue motions.

In *Francis v. State*, supra, this Court said:

> "Although it thus appears that a hearing was conducted on this motion and that the court heard the defendant, there is no transcript of that hearing in this record. Nor are the copies of newspaper articles included in the Bill of Exceptions and cannot be considered on appeal. *Driscoll v. State*, 191 Tenn. 186, 232 S.W.2d 28; *Baldwin v. State*, 204 Tenn. 639, 325 S.W.2d 244; *Chico v. State*, 217 Tenn. 19, 394 S.W.2d 648. The evidence upon which the trial court based his action is presumed to have been sufficient in the absence of a Bill of Exceptions. *Clark v. State*, 214 Tenn. 555, 381 S.W.2d 898. In the absence of such a record this court cannot say that the trial judge acted arbitrarily and abused his discretion to the prejudice of the defendant by overruling the motion for a change of venue. That is the test. Absent a clear showing of such abuse, this Court cannot reverse the action of the trial judge. *Wheeler v. State*, 220 Tenn. 155, 415 S.W.2d 121; *Swain v. State*, 219 Tenn. 145, 407 S.W.2d 452; *Wilson v. State*, 2 Tenn.Crim.App. 138, 452 S.W.2d 355; TCA § 40-2201."

It is rudimentary that a reviewing court is bound by the trial record and is not permitted to consider matters which are not included therein. *Schweizer v. State*, 217 Tenn. 569, 399 S.W. 2d 743; *Roberts v. State*, 212 Tenn. 25, 367 S.W.2d 480; *Hardin v. State*, 210 Tenn. 116, 355 S.W.2d 105; *Nance v. State*, 210 Tenn. 328, 358 S.W.2d 327; *O'Brien v. State*, 193 Tenn. 361, 246 S.W.2d 45; *Turner v. State*, 187 Tenn. 309, 213 S.W.2d 281; *Sullins v. State*, 1 Tenn.Crim.App. 630, 448 S.W.2d 96.

Nor is there any merit in the defendants' Assignments complaining of the trial judge's action in denying their motions for

separate trials. In the first place, neither of these defendants supported his motion for a severance by an affidavit. **[16]** *Mitchell v. State*, 92 Tenn. 668, 23 S.W. 68; *Hoskins v. State*, — Tenn.Crim.App. —, 489 S.W.2d 544.

It is elementary that a motion for a severance is addressed to the sound discretion of the trial court, and that he will not be put in error for failure to grant a severance unless it can be shown that the accused was clearly prejudiced thereby. *Hoskins v. State*, supra. The test for determining whether one charged with a joint crime is entitled to a severance is whether he would be unfairly prejudiced in his defense by being put to a joint trial. *Hoskins v. State*, supra. The defendants have failed to demonstrate here that their defense was prejudicially limited or otherwise frustrated by being tried jointly.

Likewise untenable is the insistence of the defendants that the trial court erroneously overruled a mistrial motion when Detective Neeley testified that in Mitchum's oral confession he implicated Elliott. They argue that this was reversible error because it violated the rule of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 proscribing admission of a non-testifying co-defendant's confession incriminating the defendant. As indicated, although neither of these defendants testified during the trial, each of them made an oral custodial confession which the trial court justifiably found to be in all respects voluntary and unexceptionable. The *Bruton* rule has no application where, as in the case before us, both of the jointly-tried co-defendants confessed. *O'Neil v. State*, 2 Tenn. Crim.App. 518, 455 S.W.2d 597; *Briggs v. State*, — Tenn. Crim.App. —, 501 S.W.2d 831.

[17] Moreover, even a violation of the *Bruton* principle, based upon the Confrontation Clause of the Sixth Amendment, will be considered harmless error if the competent evidence of the accused's guilt was overwhelming. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284.

Also groundless are the defendants' Assignments complaining about admission in evidence of the items found by the officers in the crawl space under the house where they were found and arrested shortly after the robbery and murder. They base this protest upon the proposition that the officers did not have a search warrant. As noted, the police had been tipped off that the Oakdale Superette was going to be robbed and had been furnished the names of some of the people who were planning to commit this robbery and the descriptions of the cars which would be used. As soon as the murder was reported, the police broadcasted an all-points bulletin containing the description of the automobiles. As a result, a short time thereafter one of the cars was found parked at the trailer home of William Johnson (one of the five co-defendants) and tracks in the dew-covered grass led directly to the opening of the crawl space under the next-door home of Willie Massengill, where these defendants and one of the others were found hiding. As soon as they were arrested, the officers searched the area under the house and found the above-described items which belonged to the deceased.

Thus, this record fully supports the statement made in Elliott's brief: "To be sure, no personal or proprietary interest of any of the defendants in the particular house in question has been shown." So, conceding that they had no interest whatever in the home of Massengill, a disinterested third party who had neither invited the defendants to hide **[18]** under his floor nor given them permission to do so, they had no right to trespass upon his property and seek sanctuary by hiding under his house, and they have no standing to question the validity of the search of that area.

Anyone legitimately on premises, even though not claiming ownership thereof or any interest therein, has standing to raise a question as to the legality of a search of the premises and seizure of evidence therefrom. *Lanier v. State*, 219 Tenn. 417, 410 S.W.2d 411; *Jones v. United States*, 362 U.S. 257, 80

S.Ct. 725, 4 L.Ed.2d 697. In *Lanier*, the Court quoted with approval the following from *Jones v. United States*, supra:

> ". . . No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. *This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.* As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated." (Emphasis supplied)

See also: *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247.

Neither of these defendants has at any time questioned the legality of their arrest. As intruding trespassers upon the Massengill premises, obviously their presence there was illegitimate and they were not entitled to challenge the legality of the search and the use of its fruits against them.

Mitchum separately assigns as error that the trial court overruled his motion to quash the indictment as to him for the reason that Negroes were systematically excluded from the Grand Jury which indicted him. In *Francis v. State*, supra, **[19]** the defendant undertook to raise the same question in the same way. There, as here, the motion to quash did not urge any defect appearing on the face of the indictment: no such defect appeared in that case and there is none in the present indictment. We reviewed the law on that subject in *Francis*, and have done so in many other cases. See: *State v. Smith*, 1 Tenn.Crim.App. 163, 432 S.W.2d 501; *McGee v. State*, 2 Tenn.Crim.App. 100. 451 S.W. 2d 709; *Yearwood v. State*, 2 Tenn.Crim.App. 552, 455 S.W.2d 612; *Shadden v. State*, — Tenn.Crim.App. —, 488 S.W.2d 54. In *Francis v. State*, supra, we said:

> ". . . The settled law of this State is that a motion to quash an indictment lies only where it is defective or invalid upon its face. *State v. Smith*, 1 Tenn.Cr.App. 163, 432 S.W. 2d 501; *Yearwood v. State*, 2 Tenn.Cr.App. 552, 455 S.W.2d 612.
>
> "In *Raine v. State*, 143 Tenn. 168, 186, 226 S.W. 189, 195, the Court succinctly stated the rule of law applicable to motions to quash an indictment or presentment:
>
> > 'Of course, on a motion to quash an indictment, the infirmity relied on must appear on the face of the indictment, and extraneous evidence cannot be resorted to for the purpose of establishing such infirmity.'
>
> "In *State v. Davis*, 204 Tenn. 553, 322 S.W.2d 232, the Court said:
>
> > '. . . A motion to quash an indictment goes solely to the proposition as to whether the indictment is regular upon its face.
> >
> > * * * * * * *
> >
> > 'Motion to quash an indictment will not be sustained unless it is defective or invalid upon its face. *Wireman v. State*, 146 Tenn. 676, 244 S.W. 488; *Price v. State*, 199 Tenn. 345, 287 S.W.2d 14.'
>
> "The Court reiterated this rule in *Smith v. State*, 207 Tenn. 219, 338 S.W.2d 610:
>
> > 'This assignment must be overruled for at least one reason and that is a motion to quash will not lie, unless the indictment is defective on its face. *State v. Davis*, 204 Tenn. 553, 322 S.W.2d 232'."

[20] The trial judge committed no error in overruling Mitchum's motion to quash the indictment.

Defendant Mitchum claims the court erred in admitting evidence of his identification at a police line-up, insisting that his rights were not explained to him and he was deprived of counsel. The record does not support him. The preponderance of the evidence heard upon that question by the trial court plainly establishes the contrary, and shows that the line-up was properly conducted in all respects.

Moreover, the line-up, two of them in fact, were conducted before the defendants were indicted. Thus, the requirements of *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, and *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, were inapplicable to the line-ups in the present case. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411; *Bracken v. State*, — Tenn.Crim.App. —, 489 S.W.2d 261; *Russell v. State*, — Tenn.Crim.App. —, 489 S.W.2d 535; *Maxwell v. State*, — Tenn.Crim.App. —, 501 S.W.2d 577.

After carefully considering each of the other Assignments of Error, we find that they are unmeritorious.

The judgment of the trial court is revrsed and this case is remanded thereto for a new trial.

/s/ W. WAYNE OLIVER
W. WAYNE OLIVER
Judge

In the Court of Criminal Appeals of Tennessee
Knoxville, November Session, 1973

Otis Elliott and Jerry Wayne Mitchum, Plaintiffs in Error, v. State of Tennessee, Defendant in Error.	No. 73. Bradley County.

CONCURRING OPINION

(Filed May 22, 1974)

I concur in the result reached by my brother Oliver in this case, however, I am not in accord with his view that these defendants are entitled to a transcript of an entirely different trial of co-defendants, although involving the same offense. It cannot be argued that these defendants are entitled to a fair and impartial trial. However, to say that this includes a transcript of a separate trial of their co-defendants even though containing the testimony of prosecution witnesses who testified in both cases, goes beyond the scope of any decision of the appellate courts of this State, or the United States Supreme Court, of which I have knowledge.

I am of the opinion that, under the decisions of the United States Supreme Court, these defendants are entitled to a transcript of their suppression hearing under the facts of this case. I concur in the result.

/s/ CHARLES H. O'BRIEN
CHARLES H. O'BRIEN
Judge

In the Court of Criminal Appeals of Tennessee

Otis Elliott and

Jerry Wayne Mitchum

v.

State of Tennessee

DISSENTING OPINION

(Filed May 22, 1974)

The majority reverses these convictions because of the denial pre-trial of a transcript of a pre-trial suppression of evidence (confessions) hearing. I respectfully dissent.

We have before us the transcript of that hearing. It was furnished by the Court for purposes of this appeal. It was denied only as a trial tool, and I think rightly so. The issue upon the suppression hearing was the voluntariness of the confessions, an evidence admissibility question. Once that evidence was heard the fact issue was decided by the trial judge and foreclosed. Whether or not confessions were freely and voluntarily given, while admissible again later on the issue of weight to be given the confessions, was not an issue to be fully litigated again. We are not dealing with a proceeding such as a preliminary hearing, which is totally separate and inherently requires duplication upon the later trial. A suppression hearing is really a part of the trial itself, and often the issue is not heard and determined until the regular trial is underway and the question reached in due course.

In reviewing the transcript of the suppression hearing, and the record of the balance of the trial, nothing appears that would have been beneficial in transcript form during the balance of the trial. Counsel and defendants were aware of the testimony upon the suppression hearing. No prejudice has been suggested or ap-

[2] pears. To hold that a transcript of what amounts to the opening round of a trial must be furnished instanter is but a step short of requiring a daily transcript of the trial proceedings.

I do not read the U.S. Supreme Court cases as requiring this. *Roberts v. LaVallee*, 389 U.S. 40, 19 L.Ed.2d 41, 88 S.Ct. 194, simply holds that in a State (New York) where State court reporters are present at all preliminary hearings, and make transcripts of same available to all who will pay a set statutory fee for them, it is a denial of equal protection not to furnish an indigent with such a transcript. (I cannot agree that *Roberts v. LaVallee* "requires that criminal preliminary hearing proceedings be recorded and that a free transcript thereof be made available to an indigent defendant for use at trial", a holding that would require our State to hire more than a hundred additional court reporters; but, rather, the case simply holds that where such provisions have been made the fruits thereof cannot be denied one because of his indigency.)

Britt v. North Carolina, 404 U.S. 226, 30 L.Ed.2d 400, 92 S. Ct. 431, held that although a state must as a matter of equal protection, provide an indigent defendant in a criminal prosecution with a transcript of prior proceedings when the transcript is needed for an effective defense, such a rule is not violated by a state's refusal to furnish a free transcript of a prior mistrial to an indigent defendant who sought the transcript to prepare for his second trial, which occurred a month later and resulted in a conviction for murder, where (1) both trials were before the same judge, with the same counsel and the same court reporter, (2) the trials took place in a small town where, according to the defendant's counsel, the court reporter was a good friend of all the local lawyers, and (3) the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the **[3]** second trial, if counsel had made an informal request. (The defendant thus having available an informal alternative substantially equivalent to a transcript.) To determine if such a transcript is needed for an effective defense or appeal, the U.S.

Supreme Court said that we should consider (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. It is clear that need is the key factor.

In my opinion the holding of the majority that these convictions must be reversed because of the denial of a transcript of an evidence suppression hearing goes beyond anything that the U.S. Supreme Court has held, *Britt* is little more than two years old, and it significantly qualifies the right. I believe that the transcript in this appeal demonstrates that a pre-trial copy of the transcript of the suppression hearing furnished to the lawyers and parties who were there and participated would have been of no discernable value to the defense in the subsequent litigation of the much broader question of guilt.

Judge Oliver would also hold that a transcript of a prior trial of others accused of the same crime should have been furnished. I agree with Judge O'Brien that this would go beyond anything yet decreed by the U.S. Supreme Court and/or our Supreme Court. While one might conceive of a case wherein such a transcript might be clearly helpful to a defense and thus required under *Britt*, that is not this case. One might conceive of some possible benefit from having a transcript of any like case presided over by the same judge, or prosecuted by the same lawyer; but for the rule requiring a furnishing to attach, it seems to me that a close connection not only between the cases but also of the evidence in the two cases should be made to appear. Two people could be convicted **[4]** of the same crime on totally different testimony. It is reasonable to require a defendant to specify what in a prior proceeding he requires and why it might be useful to his defense. I find no specification of variance between witness testimony upon the trial of others and testimony in the instant case. It seems to me to be reaching to hold that it was reversible error to deny the requested transcripts in

the context of this prosecution. The rule involved here must necessarily be applied on a case basis, and perhaps a situation could arise that would mandate a furnishing of a transcript of a suppression hearing and/or the prior trial of another; but I can detect no real need in this case, even with the benefit of hindsight.

I also dissent from the holding that the *Bruton* rule has no application simply because both defendants confessed. In the instant case the defendants separately confessed, directly and indirectly implicating the other; and these confessions were introduced without even a limiting instruction. I believe this to be a *Bruton* violation. The stories were not the same, and were given at different times out of the presence of the other. I would hold that this was error; but in the face of the overwhelming evidence of guilt against each man, I could hold the error to be harmless beyond a reasonable doubt. The related question of severance denial should be given careful reconsideration by the trial court should the charges be retried, as it is very difficult to legally use confessions of a non-testifying co-defendant upon a joint trial and it is established that neither of these men will likely testify. In my opinion it is not enough to simply say that *Bruton* has no application where both defendants confess.

I would add two things. First, I fail to discern the error in the Court's minutes. The convictions were for first degree murder. T.C.A. § 39-2402. Secondly, I would call attention to a **[5]** question not raised, but said by our Supreme Court in a recent Per Curiam opinion to be viable and calling for reconsideration by that Court, namely, whether flat (determinate) sentences as pronounced here are permissible in what were formerly capital cases, or should such sentences be indeterminate. See *Thurman Clay Barrett v. State*, filed by our Supreme Court in Knoxville on February 19, 1974.

/s/ WILLIAM S. RUSSELL
Judge

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Southern Division

Otis Elliott

v.

Robert Morford, Acting Warden, Tennessee State Prison.

Civil 1-75-227

OPINION

(Filed April 19, 1976)

This is a habeas corpus proceeding filed pursuant to 28 U.S.C. § 2241 in which the petitioner seeks to have his conviction and sentence set aside in the criminal case entitled *"State of Tennessee v. Otis Elliott,"* Docket No. 73 in the Criminal Court for Bradley County, Tennessee, wherein the petitioner was convicted upon March 21, 1973, of the crime of a felony murder and sentenced to 99 years imprisonment. Having alleged an exhaustion of his state court remedies, the petitioner seeks federal habeas corpus relief upon the following alleged grounds for such relief:

1. That his fourth, fifth and sixth amendment rights to the United States Constitution, as secured through the fourteenth amendment, were violated by a denial of assistance of counsel during custodial interrogation, by securing a coerced confession, and by the admission into evidence of the alleged involuntary confession.

2. That the trial court refused to supply the petitioner with a transcript of the hearing of a pretrial motion to suppress the confession.

3. That petitioner's conviction was obtained in violation of the fourteenth and fourth amendments to the United States Constitution in that certain unspecified evidence which was the product of illegal search and seizure were introduced against him in trial.

*[2] 4. That the petitioner was denied compulsory process to obtain the attendance of witnesses.

5. That the confession of a codefendant was introduced into evidence and said confession made mention of the petitioner in an incriminating fashion, and was therefore incompetent.

6. That the trial court made repeated prejudicial remarks during the trial.

7. That certain instructions of the trial court as to the nature and possible penalties for the crime involved were refused.

8. That the trial court erroneously failed to grant a change of venue, and

9. That the trial court allowed conclusions of certain laymen in lieu of expert testimony.

It is not clear that all of the foregoing grounds were presented upon appeal of the petitioner's state court conviction. Having reviewed the opinions of both the Court of Criminal Appeals and the Supreme Court of Tennessee, it is not clear that all of the grounds raised in the instant petition were raised upon appeal. If the petitioner has not raised a particular ground upon direct appeal, then the petitioner has not exhausted avail-

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* Numbers appearing in brackets in text indicate original page numbers of this opinion.

able state court post conviction relief remedies; prior to consideration of any such grounds by this Court, the petitioner would be required to exhaust all available state court remedies as to each particular ground.

With regard to the first ground enumerated above, it is clear that this ground was raised upon direct appeal. The petitioner contends that statements in the nature of a confession elicited from him by officers subsequent to his arrest resulted from a denial of assistance of counsel, resulted from brutality and physical coercion, resulted from a denial of medical attention, resulted from mental coercion, threats and brutality, resulted from an illegal arrest and detention in the Bradley County Jail, and were otherwise not freely and voluntarily given. A motion to suppress the petitioner's confession was filed and two separate hearings were had in connection with the motion to suppress, **[3]** one such hearing being on October 24, 1972 (BE 2-35), and the second such hearing being on November 8, 1972 (BE 36-185). It appears that the testimony given at the hearings upon the motion to suppress are adequately summarized in the published opinion of the Court of Criminal Appeals which has been filed in this case, in the published opinion of the Tennessee Supreme Court in the case of *State v. Elliott*, — Tenn. —, 524 S.W.2d 473 (1975), and in the answer filed by the respondent in this case. Having reviewed the full record as it pertains to the admissibility of the petitioner's statement, it is the opinion of the Court that the state trial judge conducted a full evidentiary hearing upon the petitioner's motion to suppress the introduction of the statement and determined that the statement had not been taken in violation of the petitioner's constitutional rights. This ruling was affirmed by both the Court of Criminal Appeals and the Tennessee Supreme Court. Under these circumstances, such determination is presumed to be correct under 28 U.S.C. § 2254(d), and the Court is of the opinion that an evidentiary hearing on this issue is unnecessary. See *Townsend*

v. Sain, 372 U.S. 293, 313, 9 L. Ed.2d 770, 786, 83 Sup. Ct. 745 (1963).

Tried with the petitioner was Jerry Wayne Mitchum, alias Jerry Wayne Alexander. Also codefendants but tried separately were William Johnson, Arnold Robarr, James W. Sharp and James Douglas Cline. The latter defendants were tried prior to the trial of the petitioner and the defendant Mitchum (BE 185).

The petitioner sought to have a transcript available at his trial of the two pretrial hearings upon his motion to suppress the confession and the transcript of the trial of the codefendants. Both requests were denied by the trial court (TR 81). See also BE 189. The Court of Criminal Appeals in an opinion by Judge W. Wayne Oliver would have reversed the denial of the transcript of both the pretrial suppression hearings and the denial of the transcript of the trial of the codefendants. However, in an concurring opinion Judge Charles H. O'Brien **[4]** concurred only in the requirement that the petitioner be entitled to a transcript of the pretrial suppression hearings. Judge William S. Russell dissented. Thereafter, the Tennessee Supreme Court reversed the decision of the Court of Criminal Appeals. The Tennessee Supreme Court found no authority requiring that the state make available to an indigent defendant the transcript of testimony in a third party's trial of witnesses who are expected to testify against the indigent defendant. With regard to the transcript of the preliminary suppression hearings in the petitioner's case, the Tennessee Supreme Court found that while it would have been better practice to have furnished the transcript that in this particular case there was no showing that the transcript was an instrument needed to vindicate legal rights of the accused, and that no prejudicial error was committed in denying the transcript. The holding of the Tennessee Supreme Court was based upon an analysis of the record wherein it was shown that of the four witnesses who testified in the suppression

hearing at the instance of the state, only one testified in the defendant's trial, being Detective Wayne Neeley. No inconsistencies in Detective Neeley's testimony were found and the attorneys cited none upon appeal. No significant variance in the testimony is obvious to this Court. While there is no question but that an indigent defendant has a right to a free transcript of prior proceedings in the indigent's own case where the transcript is needed to vindicate a legal right [(*Britt v. North Carolina*, 404 U.S. 226, 227, 92 Sup. Ct. 431, 30 L. Ed.2d 400 (1971); *Roberts v. LaValle*, 389 U.S. 40, 88 Sup. Ct. 194, 19 L. Ed.2d 41 (1967); *Griffin v. Illinois*, 351 U.S. 12, 76 Sup. Ct. 585, 100 L. Ed. 891 (1955)], the Court is of the opinion that under the circumstances of this particular case the failure to provide the transcript of the suppression hearings was not a prejudicial error of constitutional magnitude for the reasons set out in the opinion of the Tennessee Supreme Court and from a review of the entire record **[5]** before this Court.

The third ground advanced by the petitioner is that unspecified evidence was introduced against him as a result of an illegal search and seizure. The petitioner was arrested while hiding underneath the home of an individual known as Willie Massengill, not charged with any involvement in the case. The petitioner, together with two other negro men, were hiding in the crawl space underneath the Massengill home, which was next door to the home of William Johnson, a defendant in the case. The police had information that the supermarket in question would be robbed and had descriptions of the automobiles which would be used in the robbery, together with names of certain individuals. Following the robbery and its discovery, an all points bulletin was sent out for certain automobiles and that morning the officers found one of the automobiles parked at William Johnson's trailer home in Charleston, Tennessee. No one was in the car and only Mrs. Johnson was in the Johnson trailer home. However, fresh tracks in the dew wet grass led the officers to the next door home of Willie Massengill. Upon

discovering the three individuals hiding in the crawl space, arrests were made and the defendants were advised of their rights. A search of the area under the house produced more than $2,000 in currency, some of which was bloodstained, three rings and a wallet containing registration papers belonging to the deceased, and a check in the amount of $50.00 which the deceased had cashed for a payee on the night preceding the robbery-murder. The Court of Criminal Appeals pointed out that the petitioner claimed no personal or proprietary interest of any nature in the house where he was discovered and arrested, and the Court of Appeals concluded that the petitioner had no interest whatsoever in the home of Massengill, a disinterested third party who had neither invited the petitioner and others to hide under his floor nor given them permission to do so, thus the petitioner and others were trespassing upon Massengill's property and were seeking sanctuary by hiding under his house, and **[6]** therefore had no standing to question the validity of the search of that area. *Jones v. United States*, 362 U.S. 257, 80 Sup. Ct. 725, 4 L. Ed.2d 697 (1960).

The fourth ground of the petition is that the petitioner was denied compulsory process to obtain the testimony of Dr. Jesse Quillian and Joe Bagwell. A review of the transcript demonstrates that both Dr. Quillian and Mr. Bagwell were subpoenaed and Mr. Bagwell was certainly present in Court on more than one occasion. In any event, a review of BE 189-196 refutes any error of constitutional magnitude. The only purpose for producing Dr. Quillian was upon the motion to suppress and the trial court took judicial notice of the matters about which Dr. Quillian would testify. The testimony of Mr. Bagwell was also offered only on the motion to suppress as he was obviously available for testimony at the trial, and it appears that the testimony of Mr. Bagwell, an attorney in the case, would have been merely cumulative. The trial court noted that Mr. Bagwell had been present at the two hearings upon the motion to suppress, and had not testified. It is not clear whether or not

this contention was made upon the direct appeal but in any event it appears that this ground is without merit from a review of the record before this Court.

The fifth ground advanced by the petitioner in his petition is that the confession allegedly taken from the codefendant on trial with the petitioner was put into evidence, and made mention of the petitioner in an incriminating manner in violaton of *Bruton v. United States*, 391 U.S. 123, 88 Sup. Ct. 1620, 20 L.Ed.2d 476 (1968). The *Bruton* rule prohibits, generally, the use of one codefendant's confession to implicate the other, being violative of the nonconfessing codefendant's Sixth Amendment right of confrontation. The Court of Criminal Appeals held that the *Bruton* rule was inapplicable where both defendants confessed. The Tennessee Supreme Court, however, held that was an oversimplification of the *Bruton* rule where the confession of one nontestifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other nontestifying codefendant, so as to **[7]** expose the latter to an increased risk of conviction, or to an increase in the degree of the offense with correspondingly greater punishment. In that circumstance, the Tennessee Supreme Court held that the *Bruton* rule would be applicable. In this petitioner's case, the Tennessee Supreme Court held that the admission in evidence of the statements by Mitchum contradict the petitioner's confession and, when Mitchum did not testify, was a violation of the *Bruton* rule and was in error. The Tennessee Supreme Court went on to say that ". . . in the light of the overwhelming evidence of guilt of these defendants, other than the confessions, we find the error to be harmless beyond a reasonable doubt and not to justify a reversal of this case." The Tennessee Supreme Court relied upon *Harrington v. California*, 395 U.S. 250, 89 Sup. Ct. 1726, 23 L.Ed.2d 284. A review of the record before this Court leads the Court to the conclusion that the error was harmless beyond a reasonable doubt. The evidence showed that the petitioner had confessed to being a participant in the robbery with

the only difference being whether or not the petitioner was driving an escape or get away vehicle at a point away from the scene of the robbery or conducting that activity at the scene of the robbery. Further evidence of petitioner's involvement was his arrest while hiding under the crawl space of the Massengill home where fruits of the robbery and evidence of the murder were located.

The next complaint of the petitioner is that the trial court made repeated prejudicial remarks during the trial, in the presence of the jury, which strongly indicated that the petitioner should be found guilty. In the first place, there is no indication in either the opinion of the Court of Criminal Appeals or the Tennessee Supreme Court that consideration was given to any such assignment of error. Thus, this Court cannot consider the contention with respect to improper remarks of the trial court. *Fay v. Noia*, 372 U.S. 391, 83 Sup. Ct. 822, 9 L.Ed.2d 837 (1963). Furthermore, the allegations in this respect are purely conclusionary in nature with no citation to the record. See *Tucker v. United States*, 423 F.2d 655 (6th Cir. 1970).

[8] The seventh ground set forth in the petition contends that the trial court erred in its instructions to the jury. It does not appear from the opinion of the Criminal Court of Appeals or the Tennessee Supreme Court that this issue was considered upon direct appeal, and it is therefore not properly before this Court. Furthermore, a review of the Court's instructions at BE 407-424 reveals that no such issue was raised in the trial of the case. Special requests were submitted to the trial court and were refused, but these special requests had nothing to do with the nature of the offense and possible penalties.

The eighth ground of the petition sets forth the failure of the trial court to grant a change of venue for prejudicial pre-trial publicity. This issue is discussed in the opinion of the Court of Criminal Appeals. The Court of Criminal Appeals con-

cluded that there was no evidence in the bill of exceptions which supported or refuted the action of the trial judge in denying a change of venue for prejudicial publicity. Filed in the technical record are copies of newspaper articles and affidavits filed with motions, but there is no evidence in the bill of exceptions. The general rule is that actual prejudice must be shown in order to set aside a conviction because of pretrial and trial publicity. Compare *Beck v. Washington*, 369 U.S. 541, 82 Sup. Ct. 955, 8 L.Ed.2d 918 (1962); *Irvin v. Dowd*, 366 U.S. 717, 81 Sup. Ct. 1639, 6 L.Ed.2d 751 (1961); *Sheppard v. Maxwell*, 384 U.S. 333, 86 Sup. Ct. 1507, 16 L.Ed.2d 600 (1966); and *Estes v. Texas*, 381 U.S. 532, 85 Sup. Ct. 1628, 14 L.Ed.2d 543 (1965). There is absolutely no evidence in this case that the petitioner did not receive a fair and impartial trial or that any juror had an opinion so as to be unable to decide the case based solely on the law and the evidence.

Ground No. 9 set forth in the petition is a reiteration of Ground No. 4, and pertains to the testimony of Dr. Jesse Quillian. There was further colloquy between the Court and defense counsel pertaining to this witness at BE 399-402. There is no evidence that this issue was considered upon the direct appeal. The record indicates that the fact that petitioner was diabetic, **[9]** under the treatment of Dr. Jesse Quillian and took insulin was before the jury (see BE 390-391, for example).

An order will enter dismissing the petition for habeas corpus as being without merit.

FRANK W. WILSON
United States District Judge

APPENDIX C

No. 76-1834

United States Court of Appeals
For the Sixth Circuit

Otis Elliott, Petitioner-Appellant, v. Robert Morford, Acting Warden, Tennessee State Penitentiary, Respondent-Appellee.	On Appeal from the United States District Court, Eastern District of Tennessee, Southern Division.

Decided and Filed July 6, 1977

Before: Edwards and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Cecil, Senior Circuit Judge. This is an appeal by Otis Elliott, Petitioner-Appellant, from a denial of his petition for a writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, Southern Division.

The appellant and his co-defendant, Jerry Wayne Mitchum, were jointly indicted with three other co-defendants for the murder of Cornelius C. McClary in a robbery of his store on the morning of July 19, 1972. One other co-defendant was separately indicted for the same offense. On motion, Mitchum and the appellant were granted separate trials from their four

co-defendants but not separate from each other. The other four co-defendants were jointly tried from November 27 through December 1, 1972 and convicted in the Bradley County (Tenn.) Criminal Court. They received sentences ranging from 26 to 99 years.

[*2] Appellant and his co-defendant were jointly tried on March 20 and 21, 1973 in the Bradley County Criminal Court and convicted of murder in the perpetration of a robbery. They were sentenced to imprisonment for terms of 99 years.

The appellant and his co-defendant, Mitchum, appealed to the Tennessee Criminal Court of Appeals, where their convictions were reversed on the ground that they were denied a fair trial. The Supreme Court of Tennessee (524 S.W.2d 473) granted certiorari and reversed the Criminal Court of Appeals, reinstating the convictions.

One of the claims of the appellant, Elliott, in the District Court, is that the admission into evidence of an oral statement of confession violated his Fifth and Fourteenth Amendments on the ground that the statement was coerced and involuntary.

Before trial the appellant filed a motion for the suppression of the evidence of this alleged oral confession. The trial judge conducted a hearing on this motion and, without making any finding of facts as to the voluntariness of the confession, overruled the motion on the morning of the trial and by implication denied the appellant's claim of coercion.

At the hearing on the motion, the appellant testified that he was taken from the jail at about nine o'clock of the second night of his incarceration by deputy sheriffs and kept out for about four hours. The deputies in charge were Wayne Neeley,

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* Numbers appearing in brackets in text indicate original page numbers of this opinion.

Wilbur Moore and Chief Detective John Dailey. Elliott testified further that he was weakened from being deprived for four days of the insulin he was required to take, that he was driven around for several hours and finally taken to a cemetery. Here his handcuffs were removed and he was asked if he wanted to escape and where did he want his body sent. He testified that he was severely beaten, his dental plate broken and other coercive measures inflicted upon him. He also testified that a gun was fired within two feet of his head and told that the next one would be in his head. There was corroborative testimony that there was blood on his white t-shirt, that his mouth was swollen and his dental plate broken.

[3] After he was taken back to jail, Attorney General Earl Murphy was called and, in the presence of the above named officers, he gave the alleged confession. Deputies Wayne Neeley and Wilbur Moore testified at the hearing on the motion to suppress and each one specifically denied the alleged acts of coercion. Attorney General Murphy testified that Elliott had been given his rights, that he said he wanted to make a statement and that his statement was voluntary.

The statement taken by Attorney General Murphy was taped and recorded but not signed. Deputy Neeley testified that this recorded statement was identical to a prior oral statement made by the appellant in the presence of Deputies Neeley and Moore and Detective Bailey.

At the trial the judge refused to order the playing of the tape as the best evidence of the confessions. No other objection was made to the admission of Deputy Neeley's testimony with reference to the confession. He then testified to the alleged oral confession as follows:

> "The statement was that he and another gentleman were picked up in Chattanooga on the night of the 18th or approximately midnight. They were picked up in

Chattanooga and asked if they would like to make some money and that they had a big deal going. He said that they did, that they would, and they were brought to Cleveland and took to a residence on Inman Street or a place of business where they changed clothes and prepared for this. He stated then that they took two vehicles within the vicinity of where this took place. He remained in one at a Chevron station just off of Keith Street and waited on the rest of the defendants. Then they joined him shortly after this took place and they drove to a place near I-75, where Peerless Road goes under I-75, where one car was abandoned and they all joined in another car and went from there on to William E. Johnson's residence in Charleston where Elliott and two other subjects were placed underneath the residence next door to Johnson there. * * *"

[4] Counsel for appellant cross-examined Deputy Neeley with reference to the actions of coercion claimed by the appellant and he denied them as he did at the hearing on the motion to suppress. He also testified that he had no knowledge that the appellant showed any evidence of effects from lack of insulin for his diabetic condition. No other witness who had testified for the State at the hearing on the motion to suppress testified at the trial.

Mrs. Mattie Elliott, the mother of the appellant, testified at the trial to the effect that her son was a diabetic and that he takes U-40 insulin once a day under the direction of Doctor Jesse Quillian. She further testified that, when she saw her son in jail,

> "* * * he couldn't open his mouth real good because his upper top lip was swollen bad and he just upped it a little bit like that because it was cut across the top and he just told me, you know, that they had hit him in his mouth and broke his plate." "It was cracked and broke on the side."

Mrs. Erma Jewell Elliott, grandmother of the appellant, testified that there was nothing wrong with the appellant's dental plate the day before he was arrested.

The trial judge instructed the jury with reference to the confession as follows:

> "An admission against interest is a statement of fact made by a defendant, which tends to show the defendant is guilty of the crime charged. Evidence of such an admission has been introduced here against the defendants, but you should be cautious in receiving the evidence for this purpose.
>
> "This court has permitted admissions of this evidence of this type but it remains your duty to decide if in fact such statement was ever made. If you believe it was **[5]** not made, you should not consider it. If you decide the statements were made, you just judge the truth of the facts stated. In so determining, consider the circumstances under which the statement was made. Also consider whether any of the other evidence before you tends to contradict the statements in whole or in part. You must not however arbitrarily disregard any part of the statement, but rather should consider all of the statement you believe is true.
>
> You are the sole judges of what weight should be given this admission. You should consider it or them with all other evidence in the case in determining the defendant's guilt or the defendant's innocence."

We note that the trial judge did not explain to the jury the issue of a coerced or involuntary confession. This is under-

standable since there was no direct evidence of the alleged force and abuse testified to by the appellant on the motion to suppress. There was no objection to the judge's instructions and no proposed instructions submitted to the judge on the issue of the confession. Under Tennessee Statutes this would not be a basis upon which to charge error. (T.C.A. 40-2517)

In the opinion of the Court of Criminal Appeals of Tennessee, it was stated:

> "Upon consideration of all the testimony given at the suppression hearing, the trial judge was of opinion that these two defendants knowingly and understandingly and voluntarily made their respective confessions without any intimidation or abuse or mistreatment or coercion and after being fully advised of their rights."

This statement is not supported by the trial record. While we must assume that the trial judge concluded that the confession was voluntary, as we stated above, he made no finding of facts to that effect.

[6] The court said further that the determination of the trial court

> "* * * with reference to compliance with the *Miranda* mandate by interrogating officers and as to the voluntariness of statements made by the accused during custodial interrogation, is conclusive on appeal unless the appellate court finds that the evidence touching those questions preponderates against the trial judge's findings. (Citations). Upon appeal, the defendant has the burden of showing that the evidence preponderates against such a finding by the trial judge. (Citations). In this case the evidence fully sustains the trial court's findings."

The court further found that the appellant had failed to carry his burden of proof.

Although counsel for the appellant included in his motion for certiorari to the Supreme Court of Tennessee, the issue of the voluntariness of the confession, the court did not directly pass on that issue. It referred to the appellant's motion in the trial court to suppress and to the conclusion of the trial judge that he had confessed freely, voluntarily, and with a knowledge of his constitutional rights. We accept this as an exhaustion of State remedies on this issue.

We have given a detailed account of the history of the procedure in this case in the trial court and through the Appellate and Supreme Courts in order to bring into focus the decision of the District Judge in the case before us.

The District Judge said:

> "Having reviewed the full record as it pertains to the admissibility of the petitioner's statement, it is the opinion of the Court that the state trial judge conducted a full evidentiary hearing upon the petitioner's motion to suppress the introduction of the statement and determined that the statement had not been taken in violation of the petitioner's constitutional rights. This ruling was affirmed by both the Court of Criminal Appeals and the Tennessee **[7]** Supreme Court. Under these circumstances, such determination is presumed to be correct under 28 U.S.C. § 2254(d), and the Court is of the opinion that an evidentiary hearing on this issue is unnecessary."

Upon consideration of the record of the trial of the appellant in the State court, we conclude that the District Judge's reliance on the presumption provided in 28 U.S.C. Sec. 2254(d) is misplaced. As we have heretofore stated, the trial judge made no finding of facts on the issue of voluntariness of the confession presented by the motion to suppress and he did not resolve the conflict of testimony presented on the hearing of that motion.

Sec. 2254(d), Title 28, so far as applicable is as follows:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, *unless* the applicant shall establish or *it shall* otherwise *appear*, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing; * * *"

(Emphasis added)

In *Townsend* v. *Sain*, 372 U.S. 293 at 316, the Court said, "This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." (Citations omitted). See also *Jackson* v. *Denno* 378 U.S. 369.

We agree with the District Judge and the Supreme Court of Tennessee that, while it might have been better for the **[8]** trial judge to have allowed the appellant a transcript of the hearing on the motion to suppress, no prejudice resulted to the appellant by the failure to do so. Only one witness for the State who testified on the motion to suppress testified at the trial and we have not been shown that there was any conflict in his testimony on those two occasions.

The Criminal Court of Appeals reversed the trial court for not allowing transcripts of the hearing on the motion to supress and of the separate trial of co-defendants on the ground that the appellant was denied a fair trial. The Supreme Court

reversed. We agree with the District Court and the Supreme Court that there is no authority requiring the State to make available to an indigent defendant a transcript of the testimony of a third party's trial.

There is no merit to the appellant's claim that his Constitutional rights were violated by the admission into evidence of the fruits of a warrantless search of the basement crawl space where he was arrested. The appellant had no proprietary interest in this property and had no standing to object to the search.

There is no merit to the appellant's claim that his Constitutional rights were violated by the denial of a continuance to permit the attendance of a witness who failed to appear. This refers to Dr. Jesse Quillian who was the appellant's physician and the one who prescribed insulin for him. This is pertinent to the issue of the voluntariness of the confession and can be considered on a hearing of that issue which will be ordered herein.

Another claim made on behalf of the appellant is that his Constitutional rights were violated by prejudicial remarks made by the trial judge during trial. The District Judge did not directly pass on this issue, claiming that appellant had not exhausted his State remedies. Counsel for appellant did present the question in his petition for certiorari by the Supreme Court did not discuss it. We hold that counsel has done all he could to exhaust State remedies. We note that this is an **[9]** appeal in a habeas corpus proceeding and not a direct appeal from a criminal trial.

Of the alleged improper remarks made by the trial judge as set forth in the appellant's brief only two made reference outside the record, viz., "Sir, I have heard this proof has been before this court before. Now, * * *" and "This matter has been

before the court. I will put it that way. * * *" The other remarks were discussions before the jury pertaining to the trial in progress. We do not consider that these remarks would rise to Constitutional proportions amounting to an unfair trial.

We find no merit to the claim that appellant's Constitutional rights were violated by the trial judge taking judicial notice of certain facts concerning the requirement of the appellant to take insulin. The denial of insulin to the appellant for four days prior to the time that he made his alleged confession is charged as part of the compulsion that led to the incriminatory statements made by the appellant. This can be considered further by the District Judge when he conducts a hearing on the voluntariness of the confession.

Having concluded that there must be a remand to the District Judge to conduct a hearing on the issue of the voluntariness of the confession, we do not reach the issue of the alleged violation of the Bruton Rule (391 U.S. 123).

We reverse and remand the case with instructions to the District Judge to conduct a hearing on the issue of whether the alleged confession was voluntary.

APPENDIX D

In the Criminal Court for Bradley County, Tennessee

State of Tennessee

vs.

Jerry Wayne Mitchum, alias Jerry Wayne Alexander,
Otis Elliott, alias Otis Ellis

Case No. 5684

BILL OF EXCEPTIONS

Volume One

Filed this 7 day of August, 1973
JOE TALLEY, Clerk

Cleveland, Tennessee

In the Criminal Court for Bradley County, Tennessee

State of Tennessee

vs.

Jerry Wayne Mitchum, alias Jerry Wayne Alexander, and
Otis Elliott, alias Otis Ellis

Case No. 5684

INDEX

In the Criminal Court for Bradley County, Tennessee

State of Tennessee

vs.

Jerry Wayne Mitchum, alias Jerry Wayne Alexander, and
Otis Elliott, alias Otis Ellis

} Case No. 5684

Appearances:

For the State:
Attorney General Richard Fisher
Assistant Attorney General Eugene Worthington
Special Prosecutor Earle Murphy

For the Defendant Jerry Wayne Mitchum:
Mr. Carl E. Colloms

For the Defendant Otis Elliott:
Mr. James G. Cate
Mr. George M. Derryberry

Bill of Exceptions

[*2] Be It Remembered the above styled cause came on for hearing on a motion to suppress on this October the 24th,

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

1972, before the Honorable James C. Witt, Judge of the Criminal Court, whereupon the following proceedings were had, to-wit:

The Court: Now, Mr. Colloms, do you have the case number on this?

Mr. Colloms: This is Case number 5684.

The Court: Okay. This is a case from Bradley County on a motion to suppress by two of the defendants who have allegedly made an admission of guilt. Now, he wanted to use this man as a witness and I thought we might go ahead with this part of it. Is that okay?

General Fisher: Yes, Your Honor.

The Court: All right. Go ahead, Mr. Colloms.

* * * * * * *

MR. ROY MULL TOWNSEND,

a witness for the defendants, was called and being duly sworn, was examined and testified as follows on

Direct Examination

By Mr. Colloms:

Q. State your name, please. **[3]** A. Roy Mull Townsend.

Q. Mr. Townsend, are you a resident of Bradley County? A. Yes, sir.

Q. Back in July of this last year were you in the Bradley County jail? A. Yes, sir.

Q. As an inmate there. Is that correct? A. Correct.

Q. Do you know the defendant Jerry Wayne Mitchum or—— A. I just know him by his name Slim.

Q. And what about Mr. Elliott, Otis Elliott? A. I just know him by Slim.

Q. Which one do you know? Do you know one named Slim? A. I know all of them by their face but I don't really know their face.

Q. Where were you in jail in relation to these two defendants in particular? A. The third cell up.

Q. The third cell up from theirs. A. The third cell up from one of them and one of them the next cell each side.

Q. One of them was the next cell to you. Were **[4]** you there when they were initially brought into the jail, the first time they were brought in? A. Yeah.

Q. And how long did these individuals remain in the jail before they were taken out at any time? A. Well, I couldn't exactly say on that to tell the truth.

Q. Do you know what time of the day it was that they were brought in the first time? A. No, sir.

Q. Was it before noon or after noon? A. I think it was before noon.

Q. I will ask you if that first day if they were taken out at any time that you can recall, taken out of the cell? A. The first day.

Q. The first day or the first night. A. I think they were.

Q. Each one of them or just one of them or who? A. Each one of them.

Q. And were they taken out individually? A. Individually.

Q. And then brought back and then they would take another one out. A. They took that other one out that night.

[5] Q. Who did they take out that night? A. The one they call Slim.

They took him out that night. What time did they take him out? A. I would say about nine or ten-thirty.

Q. Do you know who in particular took him out? A. No, I don't

Q. What officer? A. No.

Q. About nine at night you say they took him out? A. Nine or nine-thirty or something like that.

Q. Did they bring him back that night? A. I don't know whether they brought him back or not. I didn't see them.

Q. You didn't see him brought back all night. How was he dressed when he went out? A. All I could see was his legs, the one they call Slim.

Q. Did he have on any shoes as far as you know? A. As far as I know he did.

Q. Did they bring him back the next day? A. I couldn't say.

Q. Do you know a deputy or former deputy Lee Moore? A. I know Lee Moore.

Q. Was he there at the jail acting as a trusty? **[6]** A. He was there acting as a trusty, that's right.

Q. During this time. A. Yes.

Q. And was it common knowledge around the jail that he was serving time for having shot a colored guy there in the jail? A. That's right.

Q. And did these boys come back and were placed back in the cells the next day? A. I couldn't say. I think they put the one they call Slim downstairs.

Q. So you don't know how long he stayed gone? A. No, Sir.

Q. Or how long the officers kept him out or what they did with him while he was out. A. I sure don't.

Q. But they did question each one of them individually? A. Yes, Sir.

Q. During that day. A. Yes.

Q. Do you know whether either Mitchum or the one you call Slim asked to talk to a lawyer or asked anybody to call a lawyer that first day they were there? A. I don't know anything about that.

[7] Mr. Colloms: You may ask him.

Cross-Examination by General Fisher:

Q. They brought them all in and locked them up and then they took them out one at a time for interrogation. They would take one out and keep him for a while and then bring him back and get another one and they kept that up on up until nine-thirty and they got the last man—— A. Well, they didn't keep it on up, you know, just for awhile and then at nine-thirty they come and got the one they call Slim and took him by "hisself."

Q. They took all of them by theirself, didn't they? A. To begin with.

Q. All right. A. And that night about nine-thirty or maybe ten they come back there and got the one they call Slim.

Q. What night was this? A. I don't remember.

Q. You don't have any idea which night it was. A. No, Sir, I don't know what night of the week it could have been on.

Q. It could have been on Saturday night or Friday night. A. It could have been.

Q. And they took them to District Attorney General **[8]** Earle Murphy at this time, but you don't know who Slim was, do you? A. Slim?

Q. Yes. A. I just know his face.

Q. Was he connected to this McClary murder or could he have been in jail on something else? A. That is what they claimed he was connected with.

Q. Now, who is they? A.Well, that is what he was charged with.

Q. Now, how do you know that? A. Well, that is what they said. It was on the news and everything and I know that is what they were questioning him about.

Q. Didn't you tell Sheriff Gibson last night or this morning that you didn't know Mitchum or anything about Mitchum? A. I don't know Mitchum. I don't know a thing in the world about him. I don't even know a thing in the world about this case.

General Murphy: I have no other questions.

Redirect Examination by Mr. Colloms:

Q. The night that Slim, as you call him, was taken from the cell, was this the night following the day that he **[9]** was arrested?

General Fisher: He is leading, please the Court, and I object to it.

Mr. Colloms: That is not leading, your Honor He can answer yes or no to it. I am not suggesting any answer to him.

The Court: All right. I will let him answer it. I have heard him answer it before but go ahead. A. It was the same night.

The Court: The night gollowing the day of the arrest. A. Yes, Sir.

Mr. Colloms: That's all.

Recross-Examination by General Fisher:

Q. Mr. Townsend, you are convicted of rape right now, aren't you? A. Yes, I have been convicted several times.

Q. Of rape. A. Age of consent, attempt to commit a felony and rape. This time rape.

General Fisher: That's all.

M. Colloms: Your Honor, we would like to excuse this witness.

The Court: He may go.

[10] Mr. Collums: Your Honor, before we introduce the other proof, my client's relatives and so forth, I would like for him to be present.

The Court: That's all right. Mr. Cate, what we did we heard one witness while we were waiting for everybody to get here. Now, I understand that the defendants should be here shortly. Let's take a short recess.

* * * * * * *

Court Was Called to Order and the Following Took Place.

The Court: Mr. Carl Colloms has some witnesses here that he wants me to hear that might not make it to Cleveland. He may not make it to Cleveland and so I will hear those witnesses now and I will continue this to the 8th day of next month, that is Wednesday of the first week of court.

General Fisher: Okay.

The Court: I am going to hear part of them because he might not get them all back together again. That is what I was worry about.

General Fisher: Okay.

The Court: All right, Mr. Colloms, put on whoever **[11]** you would like to.

* * * * * * *

MRS. LILA MITCHUM

a witness for the Defendants, was called and being duly sworn, was examined and testified as follows.

Direct Examination

By Mr. Colloms:

Q. State your name, please. A. Lila Mitchum.

Q. You are the mother of Jerry Mitchum? A. Yes.

Q. Now, back in July your son was arrested and placed in the Bradley County jail and charged with murder. A. Yes.

Q. Do you know what date this was? A. Not exactly.

The Court: Speak up so that we can pick you up.

Q. When did you get to see your son in the jail? A. I think it was on the 19th.

Q. Okay. Can you recollect how many days had passed from the time that the was arrested until you got to see him? A. I think it was about three.

Q. About three days. **[12]** A. Yes.

Q. How did you come to know that your son had been arrested? A. I heard it over the TV.

Q. And what did you do upon hearing that your son had been arrested and charged? A. Well, I got in touch with an attorney and he asked me if I had been to talk to my son and I told him no and he asked me when was I going up there to see him and I told him as soon as I could see him, and that was when I, no, I called up there and they said there couldn't be anyone see him, and we went on——

Q. Now, you say you heard it on the radio, or TV that is? A. Yes.

Q. And then you called a lawyer. A. Yes.

Q. Who? A. Harold Brown.

Q. Is he a lawyer in Chattanooga? A. Yes.

General Fisher: Was that Harold Brown?

A. Yes.

Q. Now, after you talked to him you called the Sheriff's Office in Cleveland. **[13]** A. I called him and tried to get him to come up to Cleveland and he said that he didn't practice out of Chattanooga. He said the last time he had practiced in Cleveland was about four years ago.

Q. Did you call the jail that night? After you heard this on the TV did you make any effort to call the Bradley County jail? A. No, we went up the next day.

Q. You went up the next day? A. Yes.

Q. Did you get to see your son that day? A. No. I just got to the jail, the jailer came and asked me, no, I asked him what he was charged with and he said murder and I asked him if I could see him and he said no, there couldn't be anyone see him.

Q. Now, what time of day was this? A. That was in the evening, I guess it was about six.

Q. Did you discuss with the jailer the fact that your son wanted a lawyer? A. No, I didn't talk to him.

The Court: She hadn't seen her son at that time.

A. I asked him to go ask him what lawyer he wanted and if he wanted me to get him one.

[14] Q. What was that? A. I told the jailer to go back and would he give him a message of did he want me to get him a lawyer.

Q. You told this to the jailer. A. Yes.

Q. Was this somebody that worked for the jail or was this one of the people—— A. He didn't have on a, he was a trusty I guess.

Q. A trusty. Did he go back and talk to your son for you? A. Yes.

Q. And did he bring back some information for you? A. No, he just told me the name of the lawyer that he wanted.

Q. This trusty told you the name of a lawyer. A. Yes. He told me to get Harold Brown.

Q. Now, this was the day after your son was charged? Is that right? A. Yes.

Q. Now, when did you get to see your son? A. It was about three days after.

Q. You came back up to see him. A. Yes.

Q. Before you left this first day that you were up there did anybody tell you when you could come back and see **[15]** your son? A. No, they just said they wasn't letting anyone see them right then.

Q. When you did see your son he was locked up there in the cell? A. Yes.

Q. Did you see Mr. Elliott? A. I saw him in the back. He was in a back cell by himself.

Q. Did you go back and talk to him? A. I talked to him.

Q. How would you describe his condition? What did he look like? A. Well, his lips were swollen, his mouth was swollen and his plate was broken.

Q. What was broken? A. His plate in his mouth. And blood on his clothes.

Q. What was he wearing? A. He had on a little white shirt I believe.

Q. A white shirt. A. Either a white shirt or white pants.

Q. After you had talked to your son, this being the second time you were up there, did you discuss with anybody there in control of the jail about your son a lawyer? **[16]** A. No.

Q. The only discussion you had was with this trusty. Is that right? A. Yes.

The Court: She didn't say he was a trusty. She said he was a jailer.

A. He didn't have on a uniform so I didn't know——

The Court: Well, when you started off you said he was a jailer, didn't you?

A. Trusty, I guess. I have seen him since I have been going back and forth.

The Court: Aii right.

A. He is suppose to be a trusty I believe.

Mr. Colloms: You may ask.

General Fisher: No questions.

The Court: You may come down.

* * * * * * *

MRS. FREDIA MITCHUM,

a witness for the Defendants, was called and being sworn, was examined and testified as follows.

Direct Examination

By Mr. Colloms:

Q. State your name, please. A. Fredia Mitchum.

Q. Mrs. Mitchum, for the record are you the wife **[17]** of Jerry Mitchum? A. Yes.

Q. Back in July of this year your husband was arrested and charged with a crime in Bradley County? A. Yes, Sir.

Q. Upon being charged and brought to the Bradley County jail did he make a phone call to you? A. He made a phone call about two-thirty that evening.

Q. About two-thirty that evening. A. Yes.

Q. And do you know if any particular officer was in his presence when he made the telephone call? A. All I know is that there was a detective.

Q. A detective. What did he tell you? A. He told me that they was fixing to charge him with murder and he told them before he was asked any question he wanted to talk to his lawyer and then so he said——

General Fisher: Excuse me, your Honor, but is she talking about what he said to her? A. Yes.

General Fisher: I would object to that. He can testify to that. It would be hard for her to say a detective was present when this was a telephone conversation.

[18] Mr. Colloms: This wouldn't be hearsay, your Honor.

The Court: Yes, it might be. I am going to let it in though.

Q. All right. Go ahead. You had a conversation with your husband. Go ahead and tell the substance of this conversation. A. He told me to get in touch with Harold Brown and tell him to come down there because they was fixing to charge him with murder and then after he got through saying that he told me to come down there and then he said to wait a minute and he asked the detective if I could see him and the detective told him yeah, to tell me to be down there about six o'clock. I went about five minutes after six and there was a short, he said he was a detective at the jail house, and he said that I couldn't see him and for me to come back at nine the next day.

General Fisher: We object to what somebody said who said he was a detective. He should be identified more than that. This is just getting hearsay evidence into the record. He may have been a county officer perhaps but we don't know that.

Mr. Colloms: Well, all she can do is tell what she knows.

The Court: Well, did the man you talked to **[19]** have on a uniform?

A. He had on street clothes but he had a badge on. I can describe him if I see him.

The Court: Well, I will let it in.

Q. Let me go back just a minute. Now, you were having a conversation over the telephone with your husband? A. Yes.

Q. Now, at this time did you talk to the officer also? A. No, I heard him in the background.

Q. You heard an officer in the background. A. A detective.

Q. A detective or at least somebody.

The Court: She said a detective. She didn't say at least somebody. She heard a detective.

General Fisher: We object, your Honor.

The Court: Go ahead.

Q. And you came up there that afternoon. Is that right? A. Yes.

Q. Did you get to talk to your husband? A. No.

Q. Did you have a conversation with anybody? A. I seen Otis in the hall waiting to get I guess fingerprinted.

[20] Q. What was Otis' condition at that time? A. He was all right at that time.

Q. Was his lips swollen? A. No.

Q. Did he have any blood on him? A. No.

Q. Did you personally have a conversation with any police officer there? A. The little short one.

Q. Did you tell him that your husband wanted a lawyer? A. No, I didn't.

Q. Your testimony was that in the first telephone conversation with you he asked you to get a lawyer for him. A. Yes.

Q. And you did not get to see him that first day? A. No, sir.

Q. You saw him the next day. A. Yes.

Q. Now, did you see him again two or three days later? A. That Sunday.

Q. That Sunday. And did you see Mr. Elliott also? A. Yes.

Q. What was his condition at that time? **[21]** A. His face——

General Fisher: May it please the Court, I would like to make an inquiry as to whether we are hearing both motions at this time or just the Mitchum motion.

Mr. Colloms: Your Honor, this type of evidence has some effect on my client also.

The Court: Well, as much as I am just hearing it whoever it might apply to because they may not get to the next hearing and I just want them to have their say either way.

Mr. Derryberry: May it please the Court, we would like to question this witness also and this could expedite the matter the next time we have the hearing.

The Court: Well, I can let you except that I think he is doing a pretty good job for you. Go ahead, Mr. Colloms.

Q. Now, when you saw Mr. Elliott on this Sunday what was his condition? A. His lips were swollen and his gums and some of his teeth was out and he had blood on his shirt.

Q. What kind of shirt did he have on? A. I don't really remember. All I remember is that it had blood on it.

[22] Q. What color was it? Was it a t-shirt or a button type shirt? A. I think it was a t-shirt, but I am not for sure though.

Mr. Colloms: You may ask her.

General Fisher. Are you going to let them ask her, your Honor.

The Court: Yes, if they have something that has not been asked.

Direct Examination

By Mr. Derryberry:

Q. Mrs. Mitchum, I am George Derryberry, and along with Mr. Cate I represent Otis Elliott. Is the individual Mr. Elliott you are referring to here in court? I believe that is him sitting right over there, isn't it? A. Yes.

Q. You saw him on Sunday, well, you saw him on several occasions and the first time you saw him he was in good condition. A. Yes.

Q. Now, the second time you saw him was on a Sunday. A. Right.

Q. Did you talk to him then? A. Yes.

[23] Q. And how far away from you was he? A. About as far as you are to the end of that.

Q. This close. A. Yes.

The Court: Two feet.

Mr. Derryberry: I think that is all.

Cross-Examination

By General Fisher:

Q. Was that the first time you saw him or the second time? A. That was the second time I seen him.

Q. Where did you see him the first time? A. The first time he was in the hall behind the bars and I was standing out there where the police are.

Q. By the steps. A. By the steps.

Q. Did you talk to him then? A. Yes.

Q. What did you all say? A. I was asking him what had happened and he said, "These people down here are trying to charge us with murder." And I said, "Well, where is Jerry." He said, "I don't know." I said, "How long are you all going to have to stay?" He said, "I don't know that either." He said, "When you go home will you call my mother and tell her to come down **[24]**here and bring my medicine."

Q. All right. And, well, first, where do you live? A. 731 East 4th Street.

Q. 731 East what? A. 4th Street.

Q. 4th Street. A. Yes.

Q. And where do you work? A. Dupont.

Q. And you don't know whether he had on a t-shirt or a dress shirt or what type of shirt? A. No, I don't remember.

Q. Did he smile at you the first time you saw him? A. No.

Q. Did he smile at you the second time? A. No.

Q. How do you know his upper plate had been broken? A. I didn't know he had a plate in his mouth. I thought they were his real teeth.

Q. How did you know his plate was broken? A. I know his teeth were out but I didn't know they were plates or his real teeth or what.

Q. His teeth were out? A. One of them.

[25] Q. Which one? A. I don't know. It was on his left side. I don't know which one. It was up at the top.

Q. You don't know how it got out or anything, do you? A. All I know is what he told me.

Q. When was the first time you saw him? A. The same day that they were arrested.

Q. And when was the second time you saw him? A. That Sunday.

Q. Sunday. A. Yes, Sir.

Q. What time of day Sunday? A. Visiting hours.

Q. Now, describe this person that was up there as you walked in at six o'clock. A. He was short and I would say fat and he had brown hair, dark brown. I don't know but I can point him out if I can see him.

Q. Did he had a weapon on? A. Yeah, he had a gun.

Q. Did he have a badge on? A. He had a badge on the collar of his shirt.

Q. On the collar of his shirt. A. Yes.

[26] Q. He had a badge on his collar. What color was his shirt? A. I don't remember. All I know is that he had a badge on.

General Fisher: I believe that is all.

The Court: All right. You can go back down and have a seat.

* * * * * * *

MRS. GLORIA SMITH,

a witness for the Defendants, was called and being duly sworn, was examined and testified as follows.

Direct Examination

By Mr. Colloms:

Q. State your name, please. A. Gloria Smith.

Q. Mrs. Smith, are you the sister of Mr. Mitchum? A. Yes, Sir.

Q. Did you ever come to the Bradley County jail to see or attempt to see your brother? A. Yes.

Q. When was the first time you arrived? A. I came on a Sunday.

Q. In your presence did you hear him request to get a lawyer? **[27]** A. Yes. He was talking to all of us, you know, my mother, my sister-in-law and us, and he was telling us if we had contacted Harold Brown and we said yes, that we were still talking to him, you know, about taking the case because he was, you know, trying to decide whether to take it or not, and then he said that he would rather not come, you know, from out of the city, you know, to another county like that.

Q. Did you have any conversation with relation to any Cleveland lawyers? A. It was, this man, he was sitting, he was real fat, and he was sitting and he was eating and we asked him, I mean I asked him the name of a lawyer that was in Cleveland, because, you know, Mr. Brown said it was best for us to get a lawyer that was from Cleveland, and he said "Nope."

Q. What was his answer no in response to? What did you ask him? A. I was asking him, you know, what kind, you know, I mean, some names of a good lawyer, what was the name of a good lawyer in Cleveland, you know, from Cleveland.

Q. Did you see Mr. Elliott this date? A. Yes.

Q. What was his condition? A. He was kind of crying a little bit and he had on a——

[28] Q. He was kind of what? A. He was kind of crying a little bit. He had a partial plate, and I don't think he had the partial plate in because it was bad. I don't know if there was teeth missing from the partial plate or if it was the whole partial plate but he said they treated him wrong and you know, all this and that, and said to try to see if they could get them moved home, you know, to, you know, in Chattanooga, and we said that we couldn't and his grandmother was telling it would be

all right and all this, you know. He went on to tell us what had happened. He said, his teeth was missing and he pulled up his lip here and it had bled, you know, and his gum was swelled and his lips were swollen and he said that he never——

General Fisher: We object to what he said, your Honor. She has gone into what he looked like but we object to what he related to her had happened.

Mr. Colloms: Well, your Honor, whether this is admissible——

The Court: I want to hear it whether it is admissible or not. Go ahead and tell what he told you had happened to him.

A. He said that when he first got there there was a whole lot of remarks made by these police officers and then there was this black police officer and two or three **[29]** white police officers and saying that "Well, we hope you all rot in jail." He said that these officers, that one officer, and I don't know whether it was white or black, but these shoe strings, they were tied together, he showed them to us, and I think it was a purple and an orange and a black shoe string tied together and they said, "Why don't you go on and hang yourself?" But this was after he told us that they had brought him back from this graveyard where they took him out late at night and put him down on a tombstone and fired a pistol by his head and said, "Why don't you just run, why don't you just run?" And so he didn't and he didn't say nothing and then I guess he was crying and so on and so forth and I guess they brought him back to the jail and that is when they throwed those shoe strings in his cell and said, "Why don't you go on and hang yourself and if we ever hear of anything that went on your people are going to read about you hanging yourself or killed yourself or something like that?"

Q. That is what Mr. Elliott told you. A. Yes.

Q. Was that the only time you were in the jail and saw either your brother or Mr. Elliott? A. You mean that Sunday.

Q. Yes. A. Was that the first time I came?

[30] Q. Yes. A. Yes.

Q. And have you seen him since that time in the Bradley county jail? A. Yes.

Q. How many times? A. A number of times.

Q. I will ask you if any of these other times if he discussed with you whether or not he had counsel or if he wanted counsel? A. Yes, he was talking, you mean Mr. Elliott?

Q. Yes. A. Yes, he was talking about that he wanted a lawyer——

Q. No, your brother Mr. Mitchum. A. Yes.

Mr. Colloms: You may ask her.

Cross-Examination

By General Fisher:

Q. What was your first name? A. Gloria.

Q. Are you married? A. Yes.

Q. What is your husband's name? A. Ronald.

[31] Q. Where do you live? A. At 2001 Ocoee, Apartment A.

Q. Ocoee. A. Yes, O-c-o-e-e.

Q. In Cleveland? A. No, in Chattanooga.

Q. Do you work? A. Yes.

Q. Where do you work? A. At Dupont.

Q. Your brother didn't complain about his being beaten to you, did he? A. No.

Q. Your brother at no time, did he hear you and Elliott talking? A. No, he couldn't because he was down at the last cell on the end and my brother and the other, I think it was one

more, were up, you know, as you come in the door and they were in I guess he said it was maximum security. They wasn't with any other, you know.

Q. Did you go down and ask your brother about what they had done to Elliott? A. Yes.

Q. And your brother still didn't complain to you about any treatment that he had received. **[32]** A. You mean that Elliott had received?

Q. No, that Mitchum himself had received. A. No.

Q. Did he discuss with you, either your brother or Elliott, the confessions that he had made to law enforcement officers? A. That who had made?

Q. That either Mitchum or Elliott had made. A. No. You mean that Sunday, right.

Q. Yes. A. No.

Q. Since then have they discussed their confessions they made? A. What do you mean by confessions?

Q. Of that participation in the crime. A. No.

Q. To what extent they were involved in the murder of Neil McClary? A. The only thing that they said was that they told them that they didn't do it and I think my brother said that he didn't want to talk anymore until he did have a lawyer.

Q. He didn't want to talk to you until he had a lawyer. A. No, that was what he was telling them when **[33]** he was talking to them.

Q. He didn't want to talk to the officers anymore until he had a lawyer. A. Until he had a lawyer.

Q. Do you remember whether or not your brother told you this on that Sunday? A. I believe it was on a Sunday. Yes, I believe it was on a Sunday, that first Sunday.

Q. Did he, your brother, discuss with you his involvement in the crime? A. No.

Q. Did Elliott discuss with you at any time his involvement in the crime? A. No. Do you mean whether they were actually in it or——

Q. The affair of shooting Neil McClary or dividing the money or—— A. Oh, no, that they were just, that they were in Cleveland and somewhere and the police were there, or they were somewhere and I forget where it was and they went up underneath this house because they were scared, you know, because they wasn't from there and I guess it was a small town and that the police came up under there and got them and just took them on down and booked them for murder of which they, he didn't know anything about.

[34] Q. And where are you all from? A. Chattanooga.

Q. Both Elliott and Mitchum are from Chattanooga? A. Yes.

General Fisher: That's all.

Mr. Colloms: That's all. You may come down.

The Court: Wait a minute and let me ask a question. Did you have something you wanted to ask?

Mr. Derryberry: No, sir.

The Court: Did you, he was telling you about wanting a lawyer. Did he tell you along about this time, had he been telling you about me going to appoint him a lawyer?

A. I beg your pardon.

The Court: Did he tell you that the Judge was wanting to appoint him a lawyer?

A. I don't——

The Court: Did he ever tell you that?

A. I remember that he said that he didn't think he want a court appointed lawyer.

The Court: Did he tell you that the first three times he and Elliott apppeared before me that they refused a court appointed attorney? Did he tell you about that?

[35] A. No. I recall him saying something about that he didn't want a court appointed lawyer.

The Court: He did tell you that.

A. Yes.

The Court: All right. You may come down.

Mr. Colloms: That is all the proof right now, your Honor, except for the defendant and——

The Court: It is noon now and inasmuch as we are going to have to hear this anyway I believe we ought to just hear the rest of it up at Cleveland, don't you?

Mr. Colloms: That's all right.

The Court: Is that all right with you, General?

General Fisher: I just want to satisfy the defendants, please the Court.

The Court: Well, we are going to hear them all and all the proof they have got as far as that is concerned, Mr. Colloms, and I don't want to cut you off on anything, but it is noon and I take it that these boys will have to be at the hearing anyway to hear the rest of it.

* * * * * * *

(This was all the proof introduced and proceedings had at the Hearing on the Motion to Suppress heard on the 24th day of October, 1972, in Athens, Tennessee.)

[36]

Cleveland, Tennessee
November 8, 1972

Be It Remembered this cause came on for hearing on a motion to suppress on this the 8th day of November, 1972, before the Honorable James C. Witt, Judge of the Criminal Court, whereupon the following proceedings were had, to-wit:

The Court: This is State of Tennessee versus Jerry Wayne Mitchum and Otis Elliott, case number 5684. Part of this matter was heard previously and I will continue hearing it today. Mr. Colloms, who do you have first.

Mr. Colloms: I have my client, Mr. Mitchum.

The Court: All right. Come on up here, Mr. Mitchum.

MR. JERRY WAYNE MITCHUM,

a defendant, was called and being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Colloms:

Q. For the record state your name, please. A. Jerry Wayne Mitchum.

Q. Mr. Mitchum, you under the nature of today's proceedings, do you not? A. Yes, I do.

Q. When you were arrested back in July you were brought and locked up in the Bradley County jail. Is that **[37]** correct? A. Yes.

Q. Were you locked up in a separate cell or in a cell with the other individuals? A. Well, first I was locked up in a cell with two other individuals.

Q. Were you questioned the first day that you were arrested by anyone from the Sheriff's department? A. Yes.

Q. Do you know approximately what time this was? A. It was about I would say ten in the morning.

Q. Did you make any statement at that time? A. No, I didn't.

Q. When were you questioned again?

The Court: Mr. Colloms, could we get the date in here. I am really lost on the date. If he knows or if you can get it in here.

Q. Do you recall the date that you were arrested? A. It was July the 19th.

Q. Of 1972. A. Yes.

Q. Now, you say you were questioned about ten o'clock in the morning that you were arrested? A. Yes.

Q. Were you questioned again that day? **[38]** A. Yes.

Q. About what time? A. It was about six-thirty in the evening.

Q. Did you make a statement at that time? A. No.

Q. When you were questioned were you questioned individually or along with the other gentlemen? A. We were questioned individually.

Q. Where were you questioned at? A. I guess it was in a detective's office, or Sheriff's office.

Q. Is that in the main jail building or in a separate building? A. It is a separate building.

Q. Now, you say you were questioned twice that first day. Were you questioned at any other time? A. I was questioned I believe the next day.

Q. What time of the day was it? A. It was at night.

Q. At night. Who was present during these three questionings? A. Which questioning?

Q. The first one. Let's go back to the first one. Who was present at that time? A. Officer, Detective Wayne Neeley and Wilburn **[39]** Moore and I guess it was a TBI agent.

Q. The first time you were questioned. A. Yes.

Q. Who was present at the second time? A. Officer Wayne Neeley.

Q. No one else. A. There was some more people but I don't know their names.

Q. How many were there? A. I would say about three.

Q. And the third time you were questioned who was present then? A. Detective Neeley and Officer Moore.

Q. Now, the first night that you spent in jail was there anything unusual that happened that caused you to have any fear for your personal safety? A. Well, on the first night that I was in jail I was told that there was a trusty or inmate there that had shot another inmate in this particular jail——

General Fisher: Your Honor, could we have who was telling him this.

The Court: Tell, if you know, who was telling you this.

A. This was a Townsend, an inmate here, and a trusty and I don't know the trusty's name.

[40] The Court: He was a prisoner but he was a trusty.

A. Yeah, he was a prisoner but he was a trusty.

The Court: And he was telling you these things.

A. Yes.

The Court: Was he white or colored?

A. Well, this one was white.

Q. What did this individual or these individuals tell you? A. Well, he told me that this trusty——

The Court: Excuse me. Ask them not to be using that phone in there. It interferes with what we are doing. All right, go ahead.

A. Well, I was told that there was a black man in jail accused of shooting a police officer, accused of murdering a police officer and so I was told that a deputy came in and shot this inmate in the county jail, he said he had shot him five times, and they told me that the same man that shot him was housed in the same jail, that his cell was unlocked and that he could get out any time he wanted to, you know, and they told me, you know, that it was the same guy that serves your breakfast. So I asked them, I said, "You mean to tell me they don't lock him up." And they said, "No, they don't lock him up." I asked them why and they said they guessed because he was the police, you know, and they said, "He can do what he wants to and go where he wants to."

[41] Q. Was this the first night you were in jail? A. Yes, it was the first night.

Q. Did this cause you to have any concern for your safety? A. Yes, it did.

Q. Did you see this gentlemen yourself the first day or the first night that you were in the jail? A. Well, I saw his legs. I could just see out of this feeding hole, you know, where they feed you at and this inmate there, Townsend, he told me that it was him, you know, that was feeding that morning.

Q. Did you see the dispatcher or any other officer come back into the cell area that first night? A. Yeah. About, I imagine it was about one-thirty or two o'clock the dispatcher came back through what they call the drag, it is a door they open to come back and check on you, and well, he came back and I noticed that he had a brace on his leg and he had a sawed-off shotgun and so he came up to our cell and stopped, and so, you know, I was making like I was asleep, playing like I was asleep, and so he walked on and so I got up, you know, got up and stood

up over here by the toilet, the toilet stool, because I was afraid of him, you know. I didn't know what he was doing in the jail with a shotgun because I thought at all times, you know, officers or personnel who worked, you know, at a jail wasn't suppose **[42]** to bring guns in the jail.

Q. When you were first arrested and brought to the jail were you asked or were you permitted to make a phone call? A. No, I wasn't permitted to make a phone call at first. I asked to make a phone call.

Q. Did you get to make a phone call? A. Not right then.

Q. When did you get to make a phone call? A. It was either, it was later on that day I believe.

Q. Who did you call? A. I called my wife.

Q. Do you remember the substance of your conversation with her? A. I called her and asked her if she would see about getting me an attorney.

Q. Who was with you when you made this phone call? A. This officer, I don't know his name, but he was tall and he wore a red shirt every day and he had a crew cut.

Q. He was with you when you made the call? A. Yes.

Q. Where did you make the call from? A. At this window just beside where they put you **[43]** inside this locked gate.

Q. Did you talk to anyone else about getting you a lawyer? A. Well, when we were arrested I asked Officer Neeley if I could have an attorney before we was put in the line-up.

Q. What did he tell you? A. He didn't say anything.

Q. Do you remember anybody else you talked to about getting you a lawyer? A. Well, I asked the TBI agent if I could get a lawyer and I asked——

Q. When did you ask him about getting a lawyer? A. I asked him the first day and I believe on Friday. He let me use the phone on Friday.

Q. Who did you call? A. I tried to call a Chattanooga call, William Brown, Attorney Brown.

Q. The first night you were there did Mr. Elliott spend a full night in jail there? A. Did he spend a full night?

Q. Did he spend a full night as far as you know? A. Yes, I believe he spent the full night in jail the first night.

Q. How about the next night? **[44]** A. Well, I don't know. They took him out and they didn't bring him back.

Q. What time did they come and get him? Who came and got him? A. Officer Wilbur Moore.

Q. Do you know approximately what time of night it was? A. It was about eight-thirty or nine o'clock.

Q. Was it already dark outside or could you tell? A. Yes, it was dark.

Q. Did they bring him back that night? A. Well, when they brought him back, you see, we saw them when they brought him back and it was about two-thirty or three o'clock, you know, in the morning.

Q. What was his condition or could you see him well enough to know what his condition was? A. Well, I saw him, you see, in the cell I was in I could see through the feeding hole and see out the door and he had on a white shirt and I saw that it had blood on it. He told me that they had jumped on him, you know, and then they took him on downstairs.

The Court: What day was that now?

A. I imagine this was Thursday.

The Court: You were arrested on Wednesday and you think this was on Thursday.

[45] Q. Sometime Thursday night. A. Yeah, Thursday night.

Q. Or early Friday morning. A. Early Friday morning, yes.

Q. Past midnight it would be Friday morning. At any time did any of the officers to your knowledge question Mr. Johnson? A. No.

Q. Do you know why they didn't question him? A. Because he had an attorney.

Q. Who was his attorney? A. I believe it was Mr. Bagwell.

Q. Had you had any discussion with Mr. Bagwell about him representing you? A. Yes. I asked Mr. Bagwell if he would represent me or see about getting an attorney.

Q. What day was this? A. This was the first day.

Q. Did any officer overhear this conversation? A. I am not sure. There might have been one standing at the door but you know we couldn't see the door.

Q. When Mr. Elliott was taken out of the jail was he wearing any shoes? A. No, he wasn't.

Q. Did anybody come later and pick his shoes up? [46] A. Yes. Officer Wilbur Moore.

Q. What time was this? A. It was about something to three.

Q. Had you already seen them bringing Mr. Elliott back? A. Yes.

Q. Where did they take Mr. Elliott? A. Well, I don't, when they brought him back I didn't know, you know, where they had taken him then and I didn't find out this until the next morning.

Q. Now, you say you were questioned three times by officer Neeley. Is that correct? A. Yes.

Q. During the third discussion with Mr. Neeley did Mr. Neeley make any notes? A. Make any notes?

Q. Yes. A. No.

Q. Did he have any way to make notes? Did he have pencil and paper there to where he could make notes? A. No.

Q. When you all were arrested and brought to jail was there a crowd of people there at the jail? A. Yes, there was.

Q. White people or colored people or mixed people. [47] A. Just white people.

Q. Do you know approximately how many was there? A. There looked about like forty or fifty people or maybe more.

Q. Was there quite a bit of discussion when you got out of the car? A. There was quite a bit of disturbance and discussion also.

Q. What was some of the remarks that you overheard? A. I heard some people saying that we ought to——

General Fisher: I object——

The Court: Well, I am going to allow it in.

General Fisher: I will withdraw the objection, Your Honor.

Mr. Colloms: We are not offering this——

The Court: I understand and I have ruled that it can come in. Go ahead.

A. Well, I heard some people say, "We ought to hang them now."

Q. Was this said once or twice or several times? A. You know, it was just constant remarks.

Q. When you were arrested that first day did you get to see your family? A. No.

Q. Did you request to see your family? [48] A. Yes.

Q. When did your family come to see you? A. Well, they came the first day.

Q. How do you know they came the first day? A. Well, Otis, he saw my wife.

Q. You had made a call that first day to your wife. A. Yes.

Q. And she came on up. A. Yes.

Q. And she didn't get to see you. A. No.

Q. Do you know whether, did a trusty come back and ask you or tell you that your relatives were out there? A. Yes.

Q. Did he ask you if there was anything that you wanted him to tell your family? A. Yes. I sent a message to her. I told her, I told him to tell her that I wanted a lawyer and for her to try and get me an attorney.

Q. And the trusty carried this conversation or message to your relatives? A. Yes.

Q. And did you see your relatives the following day?

The Court: What is the following day now?

[49] Mr. Colloms: If the arrest was on Wednesday this would be on Thursday, your Honor. A. Yes.

Q. About what time was it Thursday that you got to see your family? A. I imagine it was about two o'clock.

Q. Did you have a discussion with them at that time relative to your regard to get you an attorney? A. Yes.

Q. Do you know whether or not they transferred this message on to anybody there at the police station? A. She, I don't know his name, but I believe it was another trusty in jail and he wore a crew cut, and I think she was asking him about a lawyer and which was the best attorney, you know, to get in Cleveland.

Q. Did you overhear this conversation yourself? A. Yes.

Q. Do you know what he told your wife? A. Yes.

Q. Did he give her any names? A. Yes. He told her Conrad Finnell and, and I forget the other attorney's name, but it was two attorneys, two or three attorneys that he recommended her to.

Q. Again who all did you ask connected with the Sheriff's department to get you a lawyer? **[50]** A. I asked the TBI agent, Officer Wilbur Moore, Wayne Neeley, and we asked the dispatcher whoever it was that was taking our names when they brought us in.

Q. At each time you were questioned and I understand you were questioned three times, and at each time you were questioned did you ask for a lawyer? A. Yes, I asked for a lawyer each time.

Q. Did Officer Neeley or anyone else at any time advise you of your right to have counsel present at the questioning? A. No.

Q. Did he explain any of your legal rights to you relative to the right to counsel? A. No, no rights were explained.

Q. Did you sign anything? A. No.

Q. Were you offered anything to sign? A. I don't remember. I am trying to think. I don't believe so.

Q. Did they present a paper to you and say, "This is your rights. Will you read it and then sign it and then we will question you?" A. No.

Q. That didn't happen. A. No.

[51] Q. When you did talk to them the third time what was the reason for talking to them? A. Well, I feared for my life.

Q. What caused you to have fear for your life? A. Well, by this trusty walking around in the jail and you know, he had shot a black man in jail five times, you know, if he could walk around, and by this dispatcher coming back there with this

sawed-off shotgun and by them having jumped on Mr. Elliott and so I thought they were going to do the same thing to me.

Q. And it is your testimony that when you were initially arrested and brought to the jail that you asked for counsel at that time. Is that right? A. Yes.

Mr. Colloms: I believe you can ask him.

Cross-Examination

By General Fisher:

Q. Mr. Mitchum, it is your testimony that the TBI agent never read your rights to you and explained to you that you had the right to remain silent and the right to have an attorney present. You deny that he ever told you any of these things. A. No.

Q. And Officers Neeley and Moore never told you any of these things. **[52]** A. No.

Q. That third meeting with Deputy Moore and Deputy Neeley there Deputy Neeley didn't take any notes? A. No.

Q. Did Deputy Moore? A. No.

Q. You are positive of that. A. I am positive.

Q. Now, did they put any pressure or threats, direct threats to beat you up at that third meeting before any statement might have been made by you? A. Did they put any direct pressure?

Q. Yes. A. Well, not necessarily so.

Q. What caused you to make this statement? A. Because, well, I didn't make a statement.

The Court: Well, what is all this about then? There is no use in putting him on then.

General Fisher: He is denying he made a statement, your Honor.

A. Well, the fact is that I am not denying I made a statement. These were things, you know, they were just asking me leading questions.

The Court: Well, did you make a statement or confession? Did you confess to killing this **[53]** fellow? That is what this is about.

A. No, I didn't confess to killing anyone.

Q. You didn't confess to shooting Neil McClary with a shotgun? A. No.

Q. You yourself. A. No.

Q. You didn't confess to changing clothes here in Cleveland? A. No.

Q. And you didn't confess that Johnson and Sharp were involved in this murder, and Cline? A. No.

Q. In the planning, and Elliott and Arnold? A. No.

Q. You didn't confess that you had a twelve guage shotgun, single barreled, and Elliott and Arnold both had short nosed thirty-eight revolvers? A. No, I didn't.

Q. There at the scene of the crime. A. No, I didn't.

Q. And you didn't confess that you were under that trailer out there, let's see, placed under that trailer by William Johnson, the trailer where you were caught? A. No, I didn't.

[54] Q. And you didn't confess that you were under there with Elliott and Arnold? A. Yes, I said I was underneath there with Elliott and Arnold.

Q. Okay. And I believe you were next to who under that trailer when you were caught? A. I was next to Elliott.

Q. You and Elliott were side by side underneath that trailer. A. Yes.

Q. And you didn't confess that Johnson had let you out there? A. No.

Q. Or that Cline was present when you got out of the T-bird? A. No, I didn't confess to that.

General Fisher: I believe that is all.

Redirect Examination

By Mr. Colloms:

Q. Do you recall anything during this third conversation with Mr. Neeley about the questions that he was asking you as to their nature? Do you remember any of the specific questions he was asking? A. No, not right off.

The Court: Let me ask him one question. Now, **[55]** you were arrested on Wednesday the 19th, and this conversation that you had in which you didn't confess to anything was that on Thursday or Friday or when was it? A. I believe it was Thursday.

The Court: Thursday. Do you recall me bringing you up here on Saturday, the 22nd? A. Saturday, yes.

The Court: Do you recall me trying to get you to let me appoint you an attorney and you wouldn't let me? A. No.

The Court: That you refused to accept an appointed attorney. Do you recall that?

A. We didn't refuse to.

The Court: Well, do you recall me asking you and you said, "No, we are getting our own attorney. I have been in touch with my people." I believe it was Harold Brown you were getting, wasn't it?

A. I remember you saying that you would give us three days to see if we could get in touch with our lawyer because I hadn't got in touch with a lawyer. I didn't know whether or not I would have one.

The Court: Well, you refused an appointed attorney at that time. All of you did. Don't you **[56]** recall that?

A. Do I recall it? Yes.

The Court: You refused an appointed attorney and then I brought you back up three days later and you refused it again.

A. Well, you see at this particular time we had already been indicted. We needed a lawyer before we were put in the line-up and before we were ever questioned.

The Court: But you didn't want an appointed attorney.

A. Not then.

The Court: I see. Okay. That is all I wanted to ask.

Mr. Colloms: You may come down. Your Honor, we put on our other proof up in Athens——

The Court: Yes, but I think we should go ahead and finish the Elliott matter before the State responds.

Mr. Colloms: Yes.

Mr. Derryberry: May it please the Court, I would rather not put him on first.

The Court: Well, that's all right. Put on whoever you want to.

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[57] MRS. MATTIE ELLIOTT,

a witness for the Defendant, was called and being duly sworn, was examined and testified as follows on

Direct Examination

By Mr. Derryberry:

Q. Please state your name. A. Mattie Elliott.

Q. What is your relationship with Otis? A. I am his mother.

Q. Otis until he was arrested did he live with you? A. Yes, he did.

Q. And where was this? A. 1111 Moss Drive.

Q. In Chattanooga? A. In Chattanooga, Tennessee.

Q. And do you work, Mrs. Elliott? A. Yes, I do.

Mr. Derryberry: May it please the Court we would like to ask for the rule.

The Court: All right. I don't know who it is, but have you got other witnesses?

General Fisher: The state has witnesses that are present.

The Court: Who is the state going to use? I take it that they would be entitled to somebody in the courtroom.

General Fisher: We would like to have Wayne **[58]** Neeley in the courtroom with us, please the Court.

The Court: All right. Do you all have any other witnesses?

Mr. Cate: We have one.

The Court: Well, he will have to leave too.

Mr. Derryberry: We will withdraw that request, your Honor.

The Court: All right. Just let everybody stay in that wants to. Now, go ahead.

Q. How long has Otis lived there with you? A. Well, he has been living with me since not too long after he came out of the service.

Q. All right. Who else lives there in the house with you? A. His grandmother, my husband and the rest of my kids.

Q. All right. Now, does Otis suffer from some illness? A. Yes, he is a diabetic.

Q. Who was his doctor? A. Doctor Jesse Quillian.

Q. How long has he had this condition? A. Well, when he came from Augusta, well he called me from Augusta, Georgia, and told me that he had been real sick and said he was doing a little better and then he called **[59]** me again and he said, "Momma, I am still sick." I said, "Why don't you come on here to Chattanooga?" He said he couldn't find to much work down there to do and when he came up here to see me, gosh, he was just so thin and so my husband told him to go see the doctor and let Doctor Quillian check him out and so he called from Market and Ninth that he had, Doctor Quillian told him to come on home and get his pajamas that he was going to put him in the hospital right then, said that——

Q. Did they put him in the hospital? A. Yes, he put him in the hospital that particuar day he went to the doctor.

Q. Now, do you know what medication was prescribed for him? A. Yes, U-40 insulin.

Q. And do you know how often he is suppose to take it? A. Once a day.

Q. Now, Otis, he has a problem with his teeth, does he not? A. Yes, he does.

Q. Would you tell us what that is? A. Well, when he was working at Mountain City Club, I mean he had a tray and slipped up and two of his teeth got knocked out then and he had a bridge.

Q. A bridge? **[60]** A. Yes, he did.

Q. Is it actually a plate that can be removed? A. Yes, it can be removed.

Q. And how did Otis keep the plate? A. Well, sometimes he would keep it in a glass of water with this stuff that he used to keep it clean and then sometimes I have went upstairs and he just had it laying there on the corner of the chest of drawers next to the bed.

Q. How often would you see the plate out of his mouth? A. See it every day.

Q. Do you recall the day that Otis left home and didn't come back and was arrested? A. Yes. It was on——

Q. I am not asking you for the particular date but do you remember that particular day? A. Yes.

Q. Did you happen to see the plate that day? A. Yes. I saw it because I went upstairs and made his bed up and cleaned his room up.

Q. What condition was it in? A. It was just like it was when the doctor fixed it for him.

Q. Was it broken? A. No, it wasn't broken.

[61] Q. Did it appear to be harmed in anyway? A. No, it wasn't.

Q. All right. Now, did you after you had found out about Otis' arrest attempt to see him up here in Bradley County? A. Yes. Mrs. Mitchum and her daughter-in-law came over to my house and told me, she said, "I went up there to see them and your son, they have beat him." Well, when she first told me my husband called and asked if he could bring his son's medicine up there because he was a diabetic and I don't know who he was talking to, but it, maybe the dispatcher and he told him yeah and we lit out and come on up here and——

The Court: What day was that now?

A. That was the next day after——

The Court: That was Thursday.

A. Well, the next day after Mrs. Mitchum came and told me that evening and so when we got up here the man, well two or three of them were standing in the doorway, and he said, "I'm sorry but we have orders from the head chief that you can't see him." And so I said, "My husband called and said that

he was a diabetic and I brought his medicine and I want to know if it will be all right if we can give it to him?" And so he said, "Just wait a few minutes." I guess that was the chief. He went in a little office outside the cells there and so he went in and somebody was standing there **[62]** and told me, "I think that is him." So I run out to catch him and I said, "They won't let me see my son. I want to see him." He said, "No, you can't see him." I said, "Well, I have some medicine and stuff and is it okay if they give it to him." So he kind of glanced down in it and said, "Yeah, he can have it." So he said, "Carry it on in there and give it to," he said there was a black police and he told me to carry it in that little over office and give it to him and I said, "Well, will they let him have this three dollars to where he can get him some cigarettes?" He said, "Yeah, just put it in the sack with his medicine and I will give it to him."

Q. Now, have you seen Otis since that time? A. Yes, I have. I came back again and they let me see him.

The Court: That same day?

A. No. I came back that Sunday, or Monday one, I can't remember, but anyway when I came back the next time they let me see him.

Q. What was his condition then? A. Well, his mouth was swollen and he told me, I said, "I have been up here to see you but they wouldn't let me see you." He said, "The reason why they wouldn't let you see me, Momma, is they had beat me up."

Mr. Derryberry: You may ask her.

[63] **Cross-Examination**

By General Fisher:

Q. When was the last time you saw your son the day before he was arrested? A. I saw him on the same night before he was arrested. Before he was arrested?

Q. Yes. A. I saw him the night before he left home.

Q. Okay. Then he left home on what, a Tuesday morning. A. No, I guess that Tuesday night.

Q. Tuesday night was the last time you saw him. A. Yes.

Q. Now, just recently I believe aren't you aware that your son on his own had derprived himself of insulin for several days? A. Well, I heard that when I came up here that the man at the cell said that they had asked him about taking his insulin and said that he had refused to take it, and I said, "Well, I brought him some." And when I did get a chance to see him, I said, "You know, Michael, it is important that you take your medicine." He mumbled something and I don't know what he said, but you know, I didn't know whether he was taking it every day like he was suppose to or not.

Q. You were called up here to talk him into taking his insulin, weren't you? **[64]** A. Yes. Did I call up here?

Q. Yes. A. Well, my husband called the first time and I hadn't called them up, but I came up here. I haven't ever called at any time.

Q. And he had gone about four days without his insulin, hadn't he? A. Yes. Oh, you mean just recently I called.

Q. Yes. A. Yes.

General Fisher: Okay. That's all.

The Court: Is there anything else you want to ask her?

Mr. Derryberry: That's all.

The Court: If you said I didn't get it, but what about his teeth that were left at home? You never did say what had happened to them or if you did I didn't hear it. A. His teeth were broke out.

The Court: You said that his plate was left at home that night.

A. I am sorry, but you misunderstood me.

Mr. Derryberry: May it please the Court I believe she testified that she saw it——

A. The day before he left.

[65] Mr. Derryberry: The day before and it was intact.

The Court: I thought she meant that she saw them after he had left. Okay.

A. Oh, no.

The Court: Well, all right. Go ahead. You may stand aside.

General Fisher: I have got one more question, your Honor.

The Court: All right.

Q. (By General Fisher) Did your son leave a paper or a note with a license number written on it when he left home that last time? A. Yes, he did.

Q. And what was that license number?

Mr. Derryberry: Now, may it please the Court, I don't think this is material to this particular hearing on a motion to suppress any statement by the defendant.

General Fisher: May it please the——

Mr. Derryberry: I don't think any of the conduct prior to that time is material in any respect.

General Fisher: This corroborates the statement, your Honor.

Mr. Derryberry: Corroborates what?

[66] The Court: Well, it might be if he made a statement——

Mr. Derryberry: I think the question was if he left a piece of paper with a license number on it.

General Fisher: I don't know whether he is denying the statement or not. He hasn't stated if he is denying——

The Court: Well, I am going to let her answer. I don't suppose it would hurt anything. Go ahead and answer if you know what the license number was.

A. I don't know what the license number was but I have the paper at home.

Q. Do you still have that paper? A. Yes, it is at home.

Q. Okay. Will you bring that to Court when you come? A. Yes.

Q. Will you give a copy of that to Agent Helton if he comes by your home? A. Yes, I will.

General Fisher: That's all.

The Court: You may come down.

* * * * * * *

[67] MRS ERMA JEWELL ELLIOTT,

a witness for the Defendant, was called and being duly sworn, was examined and testified as follows.

Direct Examination

By Mr. Derryberry:

Q. Would you state your full name, please? A. Erma Jewell Elliott.

Q. And what relationship are you to Otis Elliott? A. I am his grandmother.

Q. Do you live there with Otis in Chattanooga? A. Yes, I do.

Q. All right. Have you had occasion in the past to see a plate that Otis wears in his mouth? A. Yes, I do.

Q. And I will ask you if you recall, not the particular date of the month, but the evening before on the day which Otis was arrested? A. Yes.

Q. Were you at home that night? A. Yes, I was.

Q. Did you see Otis that night? A. Yes.

Q. Did you see the plate that Otis has? A. Yes.

Q. Was it in or out of his mouth? A. Well, when he was getting dressed he laid it on the dresser because he dressed in my room.

[68] Q. What condition was it in? A. It was all right.

Q. Was there anything wrong with it that you could see? A. No, there wasn't anything wrong with it.

Q. How far away were you from it? A. I was, the dresser is about as far from this to you I reckon from the bed and it was laying on the dresser.

Mr. Derryberry: That's all.

Cross-Examination

By General Fisher:

Q. Let me ask you a question, Mrs. Elliott. You say you saw him just before he left that evening? A. Yes, I did.

Q. Do you recall whether he was wearing beige pants and an orange jacket or not? A. Yes, he had on beige pants but I don't know whether his jacket was orange or whether, he had a leather jacket, but I don't know what jacket he put on because I was in my room when he picked up the jacket out of the next room.

Q. Did he own a orange jacket?

Mr. Derryberry: May it please the Court, I don't think this is material either. I understand the state would like some discovery and so would we but this——

[69] General Fisher: Your Honor, she said she saw a plate just before he left and I am wondering if she really saw him at all.

A. Yes, I saw him.

Mr. Derryberry: I don't see about his clothing, your Honor, that it——

The Court: He is testing her memory I suppose as to that event. I take it that he has a right to ask that.

A. He probably, now, he has an orange leather jacket but when he was in my room he had his beige pants on and it seems like he had on a flowered shirt and so he brushed his teeth and picked them up and put them in and left out and I was over in the bed.

Q. Excuse me. A. I said I was laying on the bed.

Q. And do you recall him leaving a license number to an automobile when he left home? A. Well, not at the present, but when we heard that he was arrested my granddaughter said that he had left a note and she went upstairs to find it and gave it to her daddy.

Q. Does her daddy still have that note? A I don't know.

General Fisher: That's all.

[70] The Court: You may come down.

Mr. Derryberry: May it please the Court we have subpoenaed Doctor Quillian from Chattanooga and we are advised that he has an emergency surgery scheduled for this particular day and couldn't be here.

The Court: Now, I can furnish what he would say.

Mr. Derryberry: Well, we propose to submit a written sworn statement——

The Court: Well, he told me over the phone on I guess it was Thursday of that week that this boy was a diabetic and had to have his medicine.

Mr. Derryberry: Well, there are certain other things that he was going to put in a statement and we would like to submit

to the Court maybe in a form of a deposition on written questions or sworn statement and as I understand it that would be agreeable with the Court.

The Court: I would have to see it before I agree on it. I agreed that you could put a statement in here that he was a diabetic and had to have insulin or had to have his medicine whatever it was because I talked to the doctor myself about that.

[71] Mr. Derryberry: Your Honor did.

The Court: Yes, sir. I talked to him on Thursday of that week. I sent the officers after medicine that second day after he was arrested. Mr. Elliott was in my chambers. He knows I talked to the doctor.

Mr. Derryberry: May it please the Court, I would just like to have this in evidence and if we could, I don't want to ask for another hearing to be scheduled or anything like this, but if we could——

The Court: I am putting that in the record myself, that the doctor said that he was a diabetic and he had to have his medicine. Now, that is in the record. Now, if you have anything else in addition to that I will look at it and if the Attorney General wants to cross-examine him on it why then that is something else. I understand that you wanted to show that he was a diabetic and he was on medicine and I was agreeable to let that go into the record because I know that is true.

General Fisher: We will agree to that, please the Court. I am aware of that myself.

Mr. Derryberry: That is one of the things, your Honor. I would rather let the doctor say it.

The Court: Well, I don't know how you are going **[72]** to get him up here. I can't even get a local doctor in here. I

don't know how you are going to get him up here. It is extremely difficult to do.

Mr. Derryberry: Well, we will submit that to the Court and if it is not agreeable perhaps we will take——

The Court: Well, I will look at it and if it is something that might require cross-examination, if the state desires cross-examination on it, I won't admit it, but that part about being a diabetic and having to have his medicine I will let that in because that is true as far as I can tell.

Mr. Derryberry: Could the state submit questions in writing for cross-examination purposes to the doctor? I don't see why that wouldn't be permitted.

The Court: They could if they would agree on it.

Mr. Derryberry: General?

General Fisher: What are you wanting the doctor to say? What do you anticipate the doctor saying?

Mr. Derryberry: Well, I would call him for the purpose——

The Court: Do you have his statement?

[73] Mr. Derryberry: Not yet, your Honor. I just talked to the doctor yesterday when he told me about the problems with his schedule and the effect on the patient of being deprived of insulin, whether it is self deprivation or otherwise as far as his reliability and so on and that is the main thing, your Honor.

General Fisher: I think this would have to be subject to cross-examination, your Honor. I suggest you get his statement and then let me look at it and if——

The Court: You can take the deposition of him if the defendant wants to bear the expense and the state will agree to go down there or send one of his assistants. You know you can take a deposition in a criminal case but it has to be by agreement. There is no provision in the law for it.

Mr. Derryberry: Well, this being an appointed case I was suggesting that it be done in writing simply to avoid the expense of a court reporter and so on. Obviously, your Honor,——

The Court: These people wanted to employ counsel. The only reason they wouldn't employ counsel was that the ones they wanted to employ wouldn't take the case. Now, we have had that **[74]** argument lots of times. They haven't backed down from employing counsel. It was just a question of getting the one they wanted and they finally agreed to take an appointed one. I don't think they are, I think they have got money. I don't think that is the problem.

Mr. Derryberry: Your Honor, I thought it was an appointment for the reason of indigency. I didn't think it was for any other reason than that.

The Court: I brought them up here three or four times and it wasn't a question of, they wanted their lawyer each time, but finally and after weeks, I had the clerk call their lawyer and he wouldn't come up here and I don't know why he wouldn't come. He just wouldn't come is all and it didn't seem to be a problem of money. At least when these people first came to court it wasn't a problem of money. That may have been the problem. It might well have been, I don't know, but it didn't seem to be.

Mr. Derryberry: Is this true of all defendants?

The Court: Every one of them refused the appointment of counsel at first and I brought them up here on two or three occasions and each time I said, "Well, I will give you three more days and if you don't get a lawyer I am going to appoint you one." **[74]** Finally I just went ahead and appointed counsel. I think maybe one of them did agree that maybe he should have counsel. He was a local man who lived here in Cleveland and I don't remember his name now.

Mr. Derryberry: I would like to call the defendant, your Honor.

The Court: Come around, Mr. Elliott.

MR. OTIS MICHAEL ELLIOTT,
one of the defendants, was called and being duly sworn, was examined and testified as follows on

Direct Examination

By Mr. Derryberry:

Q. State your name, please. A. Otis Michael Elliott.

Q. Until you were arrested where did you reside? Where did you live until you were arrested? A. Chattanooga, Tennessee.

Q. And was that with your mother? A. That's right.

Q. The lady that testified today. A. That's right.

Q. Now, Otis, are, do you suffer from some illness? A. Yes, I am a diabetic.

Q. How long ago was it that this condition was diagnosed, that the doctor told you you had it? A. Well, when I first discovered that I was a **[76]** diabetic I came home and I learned, well, I didn't learn it right then when I went to the doctor, he didn't tell me, but on my way going home I had a little mishap where I fell out and when I got home and was admitted to the hospital they told me that I was a diabetic.

Q. Had there been any change in your body weight prior to your going to the hospital? A. Yes. When I was in Augusta I began to lose weight a lot. I was craved for a lot of food. One time, well, my ex-wife, she thought I was on some kind of dope because I was losing weight but I didn't know what was wrong with me. I just thought maybe I wasn't eating enough.

Q. Did they put you in the hospital after you saw Doctor Quillian? A. That's right.

Q. How long was you there? A. I was there fourteen or sixteen days along in that area.

Q. All right. What was the medicine prescribed for you? A. Well, they prescribed U-40 insulin.

Q. How much insulin do you take? A. I take forty units a day.

Q. And do you give it to yourself? A. Yes, sir. They gave me a class. I was trained **[77]** to give my own shots.

Q. Where have you kept this insulin? Did you keep it at home in the past? A. Yes.

Q. Who showed you how to give yourself those injections? A. Well, they appointed me a nurse and a dietician and they showed me how to use a needle.

Q. Now, I will ask you about the period of time right after you were arrested and placed in the Bradley County jail. About what time did you get to the jail on the day that you were arrested? A. Well, I guess right in the neighborhood of nine or ten. Right in that vicinity.

The Court: At night or in the morning?

A. It was in the morning.

Q. And how did you get there? A. Well, I was took to the jail by Deputy Wilbur Moore.

Q. All right. Was this in a police car? A. Yes.

Q. Did you say anything about a lawyer while you were in the police car on the way to the jail? A. No. I just them what I was charged with and he didn't say nothing to me.

[78] Q. And what happened after you got to the jail? A. Well, they took us out one at a time——

Q. I am sorry, but I am getting ahead of myself here. When you arrived at the jail did you say anything about your diabetic condition? A. No, not right then.

Q. How long was it before you finally said something about it? A. When they locked us up.

Q. What did you say? A. I told one of the trusties or one of the officers back there that I needed to get my medicine that I was a diabetic.

Q. What did they do? A. He said that they was busy right now but that he would tell them. I didn't get no response right then.

Q. Did they ask you for any kind of proof that you needed it? A. Well, I asked them again and so finally one asked me, he took me out, he come and got me and they said they was going to call a doctor and they asked me if I had any proof or anything saying that I was a diabetic and I told them yes, that I had a card and a pen but that it was at home.

Q. Did you give them your doctor's name? **[79]** A. Yes.

Q. Now, Sir, go ahead. After you had been there awhile did they take you out and question you? A. Yes. They took us one at a time and questioned us. There was a TBI man and another, I think it was the Attorney General that asked if I wanted to say anything. I told them no, that I wanted to talk to a lawyer before I said anything.

Q. What did they do at that time? A. Well, they would leave me and then they would carry out another one.

Q. Did they ever take you back again and ask you any questions by yourself in the jail? A. Well, I think the following day Detective Pete Davis and a Detective Williams came down, you see, I had given my name as Michael Elliott and they had misspelled it Ellis, and he came down and they talked to me about the case and showed me a picture and did I know this man

Robarr and I told them I didn't know, and they asked me again, you know. They didn't ask me nothing about the case and so they carried me back to the jail.

Q. Now, the morning that you were arrested had you had your insulin that morning? A. No, I hadn't had my insulin.

Q. Do you take it in the morning? **[80]** A. Yes, Sir. I take it in the morning before I eat, but I really hadn't had no insulin really in about three days. I hadn't ate anything really.

Q. Now, did you have some insulin the day before you were arrested? A. No.

Q. Did you have it the day before that? A. No.

Q. Had you had it three days before you were arrested? A. The last time I had had some was Saturday morning.

Q. And you gave it to yourself? A. Right.

Q. Now, how many times while you were there in the Bradley County Jail did you ask about your insulin? A. Well, I asked quite a number of times, but the trusty, each time I would ask him he seemed like he, you know, didn't care, but I kept on, you know, asking him and finally, you know, when he came back and took me down the corridor and said they were going to call a doctor but they didn't, and later on I told them that I, you know, wanted my insulin, I wanted a shot, and when they brought my food I wouldn't eat and so they carried me to the hospital later on that evening and——

[81] The Court: Wait a minute. Now, what day was that? A. That first day was Wednesday.

The Court: The day they took you to the hospital.

A. It was Wednesday night and the doctor couldn't give me no medicine because they didn't know what I was taking and they were scared to give me anything.

The Court: But they did take you to the hospital on Wednesday night.

A. Yes.

Q. Otis, who took you to the hospital? A. It was the Sheriff's son and a deputy, I don't know his name but he was kind of heavy set.

Q. How long did you stay at the hospital? A. Well, I didn't stay nothing but about twenty-five, right in there, about twenty-five minutes.

Q. And who did you see? A. Well, this doctor came in and he took my pulse and everything and he gave me some "life" water but I didn't have any proof that I took U-40 insulin and so he said he had to get in touch with my doctor.

Q. Did he ask you who your physician was? A. Yes.

Q. Did you tell him? **[82]** A. Yes.

Q. Did you hear the doctor when you were leaving say anything to the deputies about your doctor? A. Well, the only thing I think I heard him say was, "He wasn't exactly up to high." He said I was all right to go back to the jail, but see, I was trying to just get my medicine and I told him that I got dizzy.

Q. Did he tell the deputies to get in touch with your doctor or didn't he? A. Well, no, I didn't hear him say that.

Q. Well, I take it then that they took you back from the hospital to the jail. Is that right? A. That's right.

Q. Did you have your insulin the next day? A. No.

Q. All right. What were you doing? A. Well, I was just laying around in my cell, you know, and going to sleep because I hadn't had insulin and plus having not ate anything and not having your insulin there are certain reactions you have. I

was tired, you know, and weak like and so they never did give it to me.

Q. Did you ask for it that day? A. Yeah, I asked again when they was going to get my medicine but the person I was asking was a trusty because I couldn't never get near one of the deputies, none of them **[83]** come back there.

Q. How did you feel that day? A. Well, I kind of, you know, every time I would sit up I would kind of get dizzy and that is why I would lay down a lot. I was kind of weak like and feeling, you know, drowzy.

Q. All right. Would you tell the court what happened that night, the second day that you were in jail? A. Well, I was laying there, I had been sleeping awhile because I wasn't feeling good, and that night, it was kind of late and Wilbur Moore came in and told me, "Let's go." And so I got up from the bed and to my knowledge, to my thinking I thought they had done got in touch with the doctor and was going to give me some medicine and so I walked out the door and there was this car, it was a white car with a black vinyl top, and I don't know if it was an Impala or a Bel Air, but there was two officers sitting in the car. They placed me in the back seat. When I got in——

Q. Who was in the car? A. Wayne Neeley was on the right and I don't know the other officer's name that was driving but I remember his face.

Q. And was Officer Moore there? A. Yes, he got in the back seat with me.

Q. Did you see any weapon there in the car? **[84]** A. No, I didn't see no weapon.

Q. When you first got in. A. No.

Q. Now, you thought they were taking you to the hospital. A. That's right.

Q. What condition were you in that time physically? Did you feel dizzy? A. Yes, sir. I had got up out of, you know, I wasn't dizzy but I was weak like, tired, you know.

Q. Were you in the back seat? A. That's right.

Q. Could you see where you were going when you left? A. Well, while he was pulling off I kept my head down.

Q. Show the court how you were sitting in the back seat? A. Well, I was handcuffed and I just had my head facing down.

Q. Did they take you to the hospital? A. Well, we come, they come to an area where there was an open field and there was houses surrounding it and one of them made the statement that there was too many houses around.

[85] Q. What did he say? A. He made the statement that there was to many houses around, and Moore asked Neeley about a shotgun and he said that it was up front. He had a little short shotgun on the floor up front, and that is when I took for granted that I wasn't going to no hospital because we had been riding around. And they began to ride on and so Wayne Neeley made a statement, he asked me where I lived and I told him and he asked me where did I want my body to go.

Q. What did he say? A. Where did I want my body to go. When he said that it startled me and so I told them I wanted to see a lawyer, and so they didn't say nothing and they drove on. And so as he was going on there was this Ford pick-up that was passing us and so Moore hollered out, he said, "That's it." And I remember when we got arrested there was suppose to have been a truck they was saying, they was looking for a green truck, and they turned around and they stopped the man and they talked to him and I took it for granted that they was seeing if he was around in this vicinity and so he told them that he wasn't the one and so they continued on. So we came by this Grant City——

Q. Excuse me, but did you see the license number of that truck? A. No. I couldn't see it because of the——

[86] The Court: Well, if you couldn't see it go ahead and tell what happened and let's get along with it.

Q. What did you say when they asked you where you wanted your body sent? A. I told them I wanted to see a lawyer.

Q. All right. Go ahead. What happened next? A. As we was going by Grant City Moore made a statement, "Do you know where you are at?" So I raised up and I said, "No." He said, "Don't play dumb." And he was saying, he brought up the deceased's name and said that he was a good man and that he had did him a favor one time and so they drove on and we came upon the by-pass, I remember it as we came over as we were coming on the day we got arrested, and they pulled up in an open spot and there was tombs in there and so I took for granted it was a little——

Q. It was what there? A. Tombs.

The Court: Tombstones.

A. Tombstones and I took for granted there was cemetery there.

Q. Were you handcuffed at this time still? A. Yes.

Q. And how were you dressed? Did you have your shoes on? **[87]** A. No, I didn't have my shoes on. I had on a white-t-shirt and a pair of trousers.

Q. All right. What did they do when they pulled up in the cemetery? A. Well, they pulled in the cemetery and all three of them got out and went to the back of the car and was talking and again, as far, you know, I began to have more fear of wondering what was going to happen and when they came around the car and opened the door they said, "Get out." And that is when I fell to my knees and I started repeating the Lord's Prayer because, you know, I have a grandmother and she al-

ways, you know, talked to me about this, and so I began to get more frightened and Moore grabbed me by the arm and snapped me up and when I got out then he began talking some more about where was the shotgun and pistol and I told him that I didn't know and so he was walking around and he took the handcuffs off. He said about did I want to run and so I told him no.

Q. Who said this? A. Neeley asked me this.

Q. Neeley. A. That's right. He pushed me, and so Moore hauled off and hit me in the stomach and when he hit me I bent and that is when I seen that they wasn't playing, you know, not at all, that it was real what they was going to do **[88]** because Neeley made a statement, after I said something, he said, "Well, I will just tell your people, you know, that you were going to bring us out here and show us some guns and some more money and you tried to run and we just had to shoot you." And I am thinking that if they was going to make this statement they would kill me, you know, that people might have thought this, and knowing that I didn't want them to hurt me, and you know, of course I was sick at the time and I kept asking about that I wasn't feeling good and so the other one, the driver, he kicked me in the buttocks and then at the time, you know, I pleaded to them to stop, that they was harming me and all at once Moore hit me in the mouth right across here with the back of his hand and he made a statement where if I didn't like it but I didn't say nothing about it because I didn't see why he had to say that to me, "I don't like niggers with gold in their mouth."

Q. He said what? A. He said he didn't like niggers with gold in their mouth

Q. What part of your face did he hit you in? A. He hit me from the left side.

Q. What happened? A. When he hit me he made my partial plate come out and part of it broke off.

Q. Will you show the court that? Can you pull it **[89]** out? A. Well, you see, I have a partial plate placed in because I lost two teeth, and he hit it, and there is a clamp that goes from the left side and when he hit it this part broke off.

Q. Did it cut you at that time? A. It made my lip "busted" out in here.

Mr. Derryberry: Now, may it please the Court, I would like for that to be an exhibit to his testimony.

The Court: Well, I don't see how you could.

Mr. Derryberry: Well, I don't either unless we could take a picture of it.

The Court: Well, the testimony here is that it is broke. I don't know why you would want to look at it. It is just as strong that, the testimony says it is broken and I don't see how it could be strengthen it any.

Mr. Derryberry: Let the record show that the partial plate is broken. What part is gone, Otis?

A. The left part.

Q. All right. What happened then after he hit you in the face? Well, who hit you? A. Wilbur Moore.

Q. All right. And then what happened? **[90]** A. Then that is when they placed the handcuffs back on me again. Wayne Neeley, I think he said to Moore to handcuff my hands behind my back, and Moore kind of pushed me on the shoulder and he pushed me down near a tomb and he started asking again about what happened to the guns and things and I kept telling them and pleading to them that I didn't know and that I wanted a lawyer and that I wasn't feeling good and that what they was doing was wrong. And he went to his side and he pulled out, I don't know what, it looked like because I was in the service and these army forty-five's, it was an automatic like but I think it was a thirty-two and he brought it out and when I

saw that I began to get more frightened and all at once he fired it by my head and when he fired it I-——

Q. He what? A. He shot it by my head.

Q. What position were you in at that time? A. I was laying down with my hands handcuffed in back of me with my face down near a tomb.

Q. Was the side of your face on the ground? A. That's right.

Q. Were you on your knees? A. No.

Q. Were you laying flat? A. That's right.

[91] Q. How far from you do you think the man that fired the gun was when it went off? A. Around two feet.

Q. What did you think when you heard that go off? A. Well, when he shot it, at first I thought it was a nightmare. I thought I was shot really. It scared me quite a bit and he made a statement, "The next time it will go in your head." And so I started all at once thinking, you see, I went to school and I had to study history about how our people were treated a long time ago and I am thinking that these people was either going to kill me or it seemed like a hanging thing, you know, and I was already sick and scared and then he said the next shot was going in my head and he started talking about telling him what had happened and I was in fear of my life and so I started explaining to him, to the deputy that was driving, to me, he was kind of, to me he was more lenient because Wayne Neeley was talking to him and I think he is the one that got them to stop. They all at once stopped and they carried me back to the car and on our way going back he made a statement that——

Q. Who? A. Wayne Neeley, that when I get back he don't want me to say nothing about this because I would be down here for awhile, up to six months, and he asked me if I knew Alfred Francis and at the time I nodded and said I didn't know who **[92]** he was and until later I learned that he was a brother that was shot five times in a cell by another deputy.

Q. They asked you if you knew him? A. Yes. Did I know of his condition and what had happened to him.

Q. All right. Then after you got back that night did they sat you down and talk to you some more? A. Well, they carried me over to I think the city jail and he made a thing where he said he was going to try to help me get some medicine but by that time I was all upset and I had became more nervous because I had this sickness and it makes you nervous too and he told me that somebody was coming down and he gave me a book with some pictures and asked me if I knew these people, and Cline's picture was there, and he asked me if I knew him and he told me that when this man come down, you know, and he made a statement and that is when Mr. Murphy came in and so they asked me what had happened and so I didn't know, I wanted to tell him but I am thinking I didn't know who all was involved in what they had did to me and I was all upset and I was scared thinking that they was going to carry me back out there and so I just started, I told them my side of the thing.

Q. Did they take it down on a tape recorder? A. Yes, sir. I seen that he had a tape recorder on this desk.

[93] Q. What part of the jail did they put you in when you came back to the jail? A. Well, when I came back to jail Neeley told Moore to put me downstairs in the hole and when I was coming in a trusty opened the gate and Mitchum was looking out of the food hole and when he looked I dropped my head because, you know, what they had did to me I wanted to tell them but at the time they carried me on down the stairs and in about ten or fifteen minutes Moore came down with my shoes.

Q. All right. Now, you are presently in the Bradley County jail. Is that right? A. That's right.

Q. What part of the jail are they keeping you in? Are you in the drunk tank over there? A. That's right.

Q. How many people are in the cell with you from time to time? A. At first there was no one——

The Court: Is this a habeas corpus too? That doesn't have anything to do with——

Mr. Derryberry: No, I just wanted to bring it out, your Honor.

The Court: Well, there is no use to unless he is complaining about the jail. If this is a habeas corpus hearing I will hear it.

[94] Mr. Derryberry: No further questions at this time, your Honor.

The Court: All right. Cross-examine.

Cross-Examination

By General Fisher:

Q. Now, Mr. Elliott, you recall making a statement but you don't recall what you said because you were so nervous and shook up and deprived of your insulin. Is that correct? A. That's right.

Q. And you just told the story just to get some relief? A. That's right.

Q. And the District Attorney General was there at the time? A. Yes, he came down. They called him from his home.

Q. And you had on the same clothes you had had on since you were arrested, didn't you? A. That's right.

Q. And those were the same clothes you had on for the next two days, weren't they? A. That's right.

Q. The same clothes you had on when you were first before Judge Witt? A. No. I had on something else. I had on a pair **[95]** of trousers and a pajama shirt.

Q. When you came up here that Saturday morning. A. Right.

Q. All right. Now, you didn't see Mitchum when you first came back to the jail, did you? A. On the day we got arrested?

Q. No. I am talking about after your trip to the cemetery. When you came back to the jail you didn't see Mitchum at all. You didn't talk to Mitchum at all, did you? A. He was in his cell. The little hole, he was at the little hole where they serve the chow at. He was there and I saw him. He was looking out because when they opened the door, I guess they were still up and they heard the trusty open the door and that is when we came in and from that door you can see right in the hallway out there.

Q. Now, when do you usually take your insulin medicine? A. I usually take it before I eat.

Q. Breakfast. A. That's right.

Q. And how often do you usually take it? A. Well, I was suppose to take it once a day.

Q. You were suppose to take it once a day. A. That's right.

Q. All right. And you didn't take it, was it last **[96]** week, or week before last? A. Well, that's right. Because I didn't take it I thought they was carrying me back to Chattanooga and I was frightened to be back down here in this jail after knowing what had happened to me once. I wouldn't eat or I wouldn't take my medicine. My mother came down there that Friday. I was beginning to get sick, but the medicine she brought I took it. The Sheriff tried to get me to take medicine but I talked to him and told him that I wasn't going to eat or take none of the medicine because I didn't know where they were getting it from and I was scared of what might happen to me.

Q. I told you where the medicine came from, didn't I? A. Yes, but I, my lawyer, he told me the same thing.

Q. How many days did you go without your medicine this last insule strike you went on? A. Well, I went up until Friday. My mother brought me some medicine down there. I didn't take the medicine, I am not taking the medicine they gave me. I have some medicine that I took.

Q. How many days did you go without your medicine? A. Two days.

Q. Just two days. **[97]** A. That's right.

Q. Forty-eight hours. A. That's right.

Q. It was more like four days, wasn't it? A. No. I had medicine myself. I didn't take their medicine. My mother brought me medicine.

Q. I believe you told me in Court in Athens that you didn't have any medicine. Did she bring you some to the jail down there? A. She brought it Friday. I was arrested Wednesday and Thursday——

Q. I am talking about this last week. A. That is what I am saying. I just got back in the Bradley County jail on Wednesday and she came down Friday, and that is two days, Wednesday and Thursday, and I took medicine Friday.

Q. And the last time you took medicine before you were arrested was Saturday morning. A. That's right.

Q. And you were nervous and upset and didn't eat, one of the other, and so you didn't take medicine Sunday, Monday, Tuesday and Wednesday. A. That's right.

Q. Now, when was the next time you took medicine after you were arrested? **[98]** A. Well, I think it was the following week. I was eating candy, you know. You see if you don't take the medicine you can take any kind of sugar substance to calm you down from having a reaction. An insulin reaction you begin to be upset and you go in a coma.

Q. But you know, being a diabetic, before you get to the coma stage, don't you? A. That's right.

Q. Have you been in a coma before? A. No. I have been trying to avoid against one.

Q. Now, you were taken down to Bradley Memorial Hospital shortly after your arrest and a blood count was run on you and tests were run. Is that righ A. That's right.

Q. And the doctor told you that it wasn't critical at that time. A. Yes. You see they took me——

Q. The doctor told you it wasn't critical that you have insulin at that time. A. Well, he didn't talk to me. I don't know what he said.

Q. I thought you said yes just a moment ago to the same question. A. No, I was explaining to you that he said that I didn't have to have none about the coma. I was explaining **[99]** to you that I was telling him I wanted medicine. They told him that I was going into a coma.

Q. And he said that insulin wasn't necessary at that time. A. I was going out to get medicine. I don't know what they told the doctor. I think they told him that I was going into a coma.

Q. And what doctor was this? A. I don't know his name. I didn't even talk to him.

Q. What did he look like? A. Well, he was short and had kind of blondish hair and a kind of soft voice. I don't know if he was a doctor or what because he had on a green uniform. He might have been an aid.

Q. Now, you made this statement, and you made the whole thing up. Is that your testimony? A. I did what?

Q. This statement that you gave to the District Attorney, you made it up to get your self off the hook. A. At the time

when my life was in danger I give it to keep these people from harming me, to get out of that cemetery.

Q. And do you recall in the course of this detailed statement leaving a certain license number with your mother **[100]** and another girl. You told them that, didn't you? A. I told them that I left a paper with a license number on it and that I had left this at home.

Q. Do you recall telling why you left this number? A. No.

Q. In case something happened to you that they might have some idea? A. No.

Q. You left two notes, one to your sister and one to some other girl with a tag number on it. Do you not remember making that statement? A. No, I——

Mr. Derryberry: May it please the Court, I am going to object at this time. I——

The Court: Now, he said he made the statement up. It is proper cross-examination.

Mr. Derryberry: Your Honor, I don't think the truth or falsity of the particular statement ha[illegible] really anything to do with the voluntariness. The pros[illegible]tor can always say, "Sure we coerced it but it is true."

The Court: All right. If he had said that then of course we would be in a——

Mr. Derryberry: If it is true or false if it is involuntariy it is a violation of the——

[101] The Court: He says that because he was scared he made up a story. Now, I think the Attorney General in that event has the right to go into the truth of it. Now, if he said that he might have told the truth and might not have but that it was improperly got from him then you are correct.

Mr. Derryberry: I didn't understand that the whole thing was made up.

The Court: I think that is what he said, that he made it up.

A. I said that I was so scared that I told this statement——

The Court: Well, the statement that you gave did you make it up or did you just make a statement?

A. I made a statement.

The Court: You are not saying now that it is false. You are just saying that they forced it out of you.

A. Yes, they forced me to make this statement.

The Court: I don't think in that event, General, that you have the right to cross-examine him on it.

General Fisher: All right, your Honor, but that wasn't the way he stated it the first time.

The Court: No, it wasn't, but he now says it different.

[102] A. I was scared and upset.

Q. You had been deprived of your insulin since Saturday. Is that right? A. Yes.

Q. Part of the time voluntarily and part of the time while you were in custody. A. Right.

Q. And your statement was made on Thursday night. Is that correct? A. It was either that night or Friday morning.

Q. Okay. And your mouth was bleeding and your plate was broken. A. Well, my mouth was kind of cut right here but over the night that is when it swelled and this side of my face was swollen the next day. But my plate was broken because I had took it out and my mouth right here was cut.

Q. And it was still cut Sunday and so members of your family who testified up in Athens, what they said was true, that it was still "busted" cut and swollen Sunday when they visited you. Is that correct? A. Yes. You see, I was in the hole and they brought me up Sunday morning because the Sheriff was coming

back in town. The Sheriff was out of town when all this happened and when they brought me back to the cell they put me in here and when my people came up I explained to them but **[103]** I told them not to say anything about it because after what they had told me that they was going to carry me back out and I was violated of my rights.

Q. Now, these people in Athens testified that they saw blood on your shirt, didn't they, on Sunday? A. Right, where I had wiped my mouth.

Q. This was on Sunday. A. Right.

Q. And this was the pajama shirt or the t-shirt? A. The t-shirt.

Q. Okay. And this is the same shirt you had on when you made this statement and the same shirt you had on when you were ridden around the county and taken to the cemetery in. Is that right? A. That's right.

Q. And there was blood all over it. A. There was blood in a few places here.

Q. Now, you heard the testimony of Mr. Mitchum that there was blood all over the front of that shirt. A. He said there was blood on my shirt right in here.

Q. How big a spot of blood? A. Well, I can't say. I didn't pay, you know, too much attention to it all at the time. I was scared and I was wiping my mouth.

[104] Q. And you had that shirt on for how many days? A. I wore it up until around, I took it off Sunday night.

Q. You wore it continuously till Sunday right. A. Right.

Q. And Judge Witt saw you with your "busted" lip and swollen face and "busted" plate. Right. And with blood on your shirt. A. I don't know what all he said.

Q. All right. A. I can't speak for Judge Witt.

Q. But you had this t-shirt on at the time of your arrest to Sunday night when your folks saw it on you, or Sunday afternoon. A. Yes.

Q. Did they bring some clothes up here? A. Yes. I had a pajama shirt I had put over it to come to court because I didn't want to wear it like that over here in court.

Q. Okay. But you kept it on with the blood and everything. A. No. I wore the pajama shirt to court.

Q. Yes, but you had the bloody t-shirt on under it. A. That's right.

[105] Q. And you were taken out of the jail and questioned were you ever advised that you had the right to an attorney and a right to remain silent? A. That night.

Q. Every time you were questioned? A. One time when I first got arrested I was told this.

Q. By whom? A. Mr. Helt.

The Court: Helton.

A. Helton. That's right. A TBI man. He was the only one.

Q. Now, you sent notes out several times asking officers to come and talk to you, didn't you? A. Yes, so I could get some medicine.

Q. Now, you talked to them about things other than medicine, didn't you? A. No.

Q. You didn't send notes to them that you wanted to come talk to them about this crime? A. No, I was going to talk to Mr. Helton but I changed my mind.

Q. Now, you talked to Mr. Helton, didn't you?

Mr. Derryberry: Now, may it please the Court, if I recall our last hearing there was a stipulation **[106]** in open court by the District Attorney that there was only one statement taken from the defendant.

The Court: Well, this is on a question of voluntariness. I would have to let this in. If he wanted to talk to somebody and went and talked to somebody why of course I would have to let it in.

Mr. Derryberry: Well, it is my understanding that there was only one statement given.

The Court: Well, if he now says there is two he can give you a copy of it and make it admissible.

Mr. Derryberry: Do I understand that the Attorney General is saying that?

The Court: Well, let's wait and see. We will find out together. I don't know either.

Q. Did you make a statement to Mr. Helton? A. No, I didn't make no statement to him.

Q. All right. He called you in and you talked to him for a few minutes and you didn't say anything else. You all didn't talk about your participation in the crime or about you not participating, did you? A. Well, he asked me one time about it but I didn't say nothing.

Q. Now, when you went up to the District Attorney General were your rights read to you, was it explained to you that you had the right to an attorney, the right to remain **[107]** silent? A. When was this?

Q. When you made this statemen' 'hat was put on tape? A. Well, at the time, well, to my knowledge I don't know because I was all upset and I don't know what they said to me.

Q. You can recall giving all these details—— A. I recall they was talking to me and they got this down on a tape.

Q. Do you recall describing a home in Bradley County?

Mr. Derryberry: Here we go again, your Honor. I thought your Honor had ruled that we weren't going into this.

The Court: Well, inasmuch as he says he was confused and didn't remember anything he has the right to test his memory.

Mr. Derryberry: I thought he wasn't asking him about that——

The Court: He is asking him as to what details he went into in the statement. I think he would have the right to do that. That would tend to show or not to show that he was at himself at the time he made this statement. He would have the right to **[108]** question him on that.

Mr. Derryberry: If I understood your ruling, your Honor, if he said that the statement was forced out of him——

The Court: I am not going to let Mr. Fisher ask him if this is true or not, that you help do this. I am not going to let him ask him that. I am going to let him test him as to these things he said in the statement or was suppose to have said.

Q. Did you respond to a question, "Was an apartment building behind the house?", and did you respond, "Yes, there was a house next to with lights ar ınd it and a green thunderbird. Now, what it was when ınorning came I was sitting in a white Riviera about one hundred feet from a Chevron filling station." A. Do you——

Q. Do you recall making that statement? A. I recall saying about the white car and behind this house but the portion was planted really about the house and green thunderbird I ain't never seen. This was the house that was described to me by Mr. Neeley and I went ahead and said this on tape.

Q. Okay. The house was described to you. The next question, "Chevron filling station," and did you make this answer. "I was told to wait until they came back and **[109]** was suppose to go with them to the Johnson house. This fellow Kitty, he came back in a Thunderbird. He jumped out and got in the car and told me, 'Let's go, that something had happened.' I asked him what had happened. He said, 'Let's go.' We left

there and came to this trailer and the house." Do you recall making that statement with a lot more than that in the same answer to the question, "Chevron filling station." A. That's right.

Q. You gave that long answer. You recall that. A. That's right.

Q. Okay. You recall these answers, you recall the detail aspects of these answers and are you sure you don't recall whether or not your rights were read to you before you made these answers? A. To the best of my knowledge I don't know.

Q. Turn around and look at the gentleman seated behind you. A. Well, I have seen him.

Q. With the white hair and the glasses on. A. Right.

Q. Didn't he read your rights to you and tell you that you had the right to remain silent if you wished to? A. I don't know. I don't know.

Q. You are not saying that he didn't, are you? A. I am not saying he did or he didn't. I don't **[110]** know.

Q. And he didn't threat you with any hostility, did he? A. No.

Q. Who else was in the room? A. Well, Wayne Neeley and this little bunch——

Q. Wayne Neeley and what? A. Well, the other fellow and Wilbur Moore.

Q. What other fellow? A. I don't know his name but he is sitting next to Wilbur Moore.

Q. This guy right here. A. Yes.

The Court: Mr. Fisher, since we can't possibly finish this before lunch I suggest we go eat and then come back.

General Fisher: I think so, your Honor.

The Court: The state is going to have to put some proof on and——

General Fisher: They have made some allegations that I could not have anticipated and I may need to get Doctor Parkinson from the hospital up here.

The Court: Well, why don't we go to lunch, and you can find out about that, but I say we quit now for a few minutes. Let's stop now and go eat. We **[111]** will take a recess until everybody get's back, and hopefully at one o'clock.

* * * * * * *

Court Was Called to Order and the Following Took Place:

The Court: Now, Mr. Fisher, you were in the process of cross-examination. Go ahead.

Q. You were arrested on a Wednesday morning. A. That's right.

Q. And you were questioned first by whom? A. If I am not mistaken when they first brought us in it was by Mr. Helton. He was at the first one I think. The Attorney General was in there too I think.

Q. And you were advised of your rights at that time? A. That's right.

Q. And you did not request an attorney. A. Yes, I asked to see a lawyer.

Q. And that is your sworn testimony. A. What?

Q. Is it your sworn testimony that you asked to see a lawyer? A. Yes.

[112] Q. And the Attorney General seated behind you was there. A. That's right.

Q. And you didn't want to make a statement until you had seen an attorney. A. I didn't want to talk to no one until I had seen an attorney.

Q. All right. When was the next time you were talked to? A. I was talked to I think the next day when Detective Pete Davis and Detective Williams came down and I was brought out again.

Q. You had given a name other than Elliott, hadn't you? A. No. I had gave, well, I had, but I had used my middle name as Michael Elliott and so I guess the man who booked us put Ellis, but I told them Elliott. They had it Michael Ellis.

Q. And the second time was Davis and Williams. A. That's right.

Q. Where are they from? A. Chattanooga.

Q. Did you tell them you wanted an attorney before you discussed it with them? A. No, oh, they just showed me a picture and asked **[113]** me if I knew this fellow and I told them no. You know, I just told them, and they asked me if I was in it and I told them no. That's all.

Q. All right. Were some of your folks or you one trying to get a hold of an attorney in Chattanooga? A. That's right.

Q. All right. Now, you sent messages out from the jail to see Mr. Helton. Is that correct? A. Well, I sent one to him.

Q. And another message to Mr. Neely. A. Yes.

Q. And this was when, the second day? A. Well, I sent one, if I am mistaken I don't know if it was the first or second day because it was concerning that I wanted to get my medicine so it was the first day because I didn't talk to either one of them after the cemetery.

Q. Now, this thing, did it happen that night or was it the next day? A. About what happened?

Q. Yes. A. No, it happened the next day. It was Thursday night.

Q. Thursday night. A. Yes.

[114] Q. Sometime Thursday you sent word out that you wanted to see Mr. Neeley. A. About getting some medicine.

Q. Okay. And then Thursday night or Friday morning is when you made this statement. Did you at that time express a desire to see an attorney? A. Yes, I asked Mr. Neeley that I wanted to see a lawyer when I was in the car.

Q. Did Attorney General Murphy ask you if you wanted to see an attorney? A. No.

Q. Prior to your giving a statement to him in the police station? A. No, he didn't ask me that.

Q. All right. Did you tell him you wanted to see an attorney before you made a statement? A. No. I didn't say too much to him.

Q. Well, you said a whole lot to him, didn't you? We went through part of it a little bit earlier. A. Well, I didn't, you know, ask him nothing about a lawyer or nothing because I figured, you know, the same questions.

General Fisher: That's all.

Mr. Derryberry: I think that is all, your Honor.

[115] General Fisher: Let me ask him one other thing.

Where was this graveyard you were taken to?

A. Well, I don't know where it was at but I think I can remember it again. We went up under a bridge, one of these like concrete bridges where you see on freeways, and we went up under it and about a hundred feet away from there was a road that turned to the right, and it was like, a little small hill and we went up there and this section was about five-tenths from that area, and it was kind of sloped.

Q. How far was this from Grant City? A. Well, they had me over in that vicinity but I remember we came across this bridge when we was coming back to Cleveland after we got

arrested and we went up under the bridge as we came to the cemetery.

Q. This is the same way they brought you back when you were arrested, the same way you went to the cemetery. A. No, we was going out the road by Grant City and they made som kind of turn and then we came up under this bridge. I remember the bridge——

Q. Which way did they turn when——

Mr. Derryberry: May it please the Court, I can't hear the questions and——

The Court: Yes. You are going to have to take the baby out, lady. We can't hear. I am sorry.

[116] Q. Which way did they turn after you left Grant City? A. They made a left turn.

Q. Okay. That put you on the highway to Charleston, didn't it? A. Well, I don't know. You know, I am not familiar with the highways.

Q. You have never been to Charleston before. A. No.

General Fisher: No further questions.

The Court: Do you have anything else?

Mr. Derryberry: No, your Honor.

The Court: I want to ask him a question. Mr. Elliott, you were arrested on Wednesday, the 19th, and indicted and arraigned on Saturday, the 22nd.

A. That's right.

The Court: Now, in between that time, Wednesday the 19th and Saturday the 22nd, you wrote me a letter and it was hand delivered.

A. That's right.

The Court: You had somebody bring it up here to me.

A. That's right.

The Court: What day was that on?

A. I think that was, I am not quite sure. I **[117]** don't know if it was Thursday morning or not. It was on Thursday or Friday.

The Court: And you, I had you brought up here.

A. We came up here Saturday.

The Court: Did I not bring you up here before Saturday?

A. No.

The Court: And I called your doctor and talked to him.

A. That's right.

The Court: And you came in my chambers and talked to me a while.

A. That's right.

The Court: You never told me about anything being wrong with you, did you?

A. Well, your Honor, I wanted to and then I, I was scared, you know, if I had said at the time in your chamber, I think there was an officer, you know, plus other people in there, and I don't want to say nothing that I figured might cause——

The Court: How many letters have you written me?

A. Well, I wrote you once down here and I think twice in Chattanooga.

The Court: That were very confidential and **[118]** very open and frank, weren't they?

A. Yes.

The Court: In which you trusted me absolutely.

A. Yes.

The Court: And you never have mentioned this before about somebody hitting you or anything, have you?

A. No.

The Court: The first time I saw you you had on a white skiddy shirt. Isn't that correct?

A. Yes, sir.

The Court: A t-shirt. And the next time I saw you you had on a blue or purple——

A. It was a blue.

The Court: A loud thing kind of like a Chinese would wear.

A. Yes, sir. A pajama shirt.

The Court: That is a pajama shirt. That was the second time, wasn't it?

A. That's right.

The Court: I didn't see any blood on that skiddy shirt the first time.

A. Well, it was on the front of it.

The Court: Well, maybe it was but I didn't see it, and you didn't show it to me.

[119] A. When I came and talked to you I had on my pajama shirt.

The Court: You did the second time, yes, sir.

A. That is the time we came and you were going to give us a lawyer.

The Court: Sir?

A. When I came and talked to you it was on a Saturday.

The Court: Well, the time I brought you in my chambers the first time as I recall you had on a white skiddy shirt, and

then the second time you had on a purple kind of Japanese kind of pajama shirt.

A. That's right.

The Court: It may have had had a dragon on it but I am not sure.

A. It was a pajama shirt.

The Court: It was that type of pajama shirt.

A. That's right.

The Court: I called the doctor and got your medicine that day, didn't I?

A. Well, you called and verified that I was a diabetic.

The Court: Well, didn't I send an officer immediately after your medicine?

[120] A. You told them to see that I got my medicine.

The Court: Well, you got it that day, didn't you?

A. Yes, I think it was on that Saturday.

The Court: All right. That is all I want to ask him.

Mr. Derryberry: May I approach the bench, your Honor.

The Court: Yes.

(Mr. Derryberry approached the bench and the conversation of Mr. Derryberry was inaudible to the microphone.)

The Court: You can if I can find them. They are at home somewhere. One was hand delivered up here and the other two were mailed to my home in Madisonville.

Mr. Derryberry: Well, we would like to see them, your Honor.

The Court: Well, if I can find them you can. I don't know that I saved them but he did write me. I didn't intend to dis-

close what was said as far as that is concerned except in as far as it effects this matter right here.

Mr. Derryberry: Well, I would like to see——

The Court: If he don't care you can have them **[121]** but I don't think it effects, the only part that I meant to bring out about it was that he did not tell me about being assaulted by an officer. That is the only thing I meant to say about it.

Mr. Derryberry: I was wondering if it is the type of thing wherein he would have said something——

The Court: I don't know. I really don't know. All right. You may come down. Who do you have next, gentlemen?

Mr. Derryberry: Other than the doctor, whose statement we will submit later, that is our case.

The Court: All right. Now, General, who do you want to put on?

General Fisher: Call Wayne Neeley.

* * * * * * *

MR. WAYNE NEELEY,

a witness for the State, was called and being duly sworn, was examined and testified as follows:

Direct Examination

By Attorney General Fisher:

Q. You are Wayne Neeley. A. Yes, sir.

Q. A deputy with the Bradley County Sheriff's Department? A. Yes.

[122] Q. And were you a deputy back in July of this year? A. Yes, I was.

Q. And were you in on the arrest and questioning of Jerry Wayne Mitchum and Otis Elliott? A. Yes, sir, I was.

Q. In connection with the murder of Neal McClary? A. Yes.

Q. Did you hear Mr. Mitchum testify from the stand earlier this morning? A. Yes, sir, I did.

Q. And were you in on the questioning of him on three different occasions? A. Yes, sir, several occasions, more than three.

Q. All right. On each of these occasions did you explain to him the rights of a defendant, a person charged with a crime? A. Yes, sir, he was. On two occasions he signed, he was read forms and on the other occasions, the total occasions or number of occasions I don't remember but there were several more than three, but he was advised of his right to have a lawyer and his civil rights.

Q. Do you have a card from which you read? A. Yes, sir.

Q. Do you have that card with you? **[123]** A. I don't have it with me, no.

Q. Did you read from the card? A. Yes.

Q. Do you have that memorized? A. Yes, sir.

Q. Would you recite what you told Mr. Mitchum, if you are able to recall? A. I advised him that he had the right to remain silent, that anything he said can be used against him in a court of law, that he is entitled to a lawyer before questioning and that if he can't afford a lawyer one would be appointed by the court for him, and if he wished to make a statement that he could stop at any time and consult his lawyer.

Q. All right. Did he ever tell you that he wanted a lawyer before he talked to you? A. He mentioned a lawyer one time, something about could he get a lawyer and I said, "Yes, the court will have to appoint you a lawyer if you can't afford one."

Q. And were you present when he made an oral statement implicating his participation of the robbery and murder of Neal McClary? A. Yes, sir, I was.

Q. Now, was there any coercion put on him at the time this statement was made? A. No, sir.

[124] Q. Who else was present? A. Deputy Moore. Are you talking about the statement that he is questioning here today?

Q. The statement implicating his participation in this crime. A. Deputy Sheriff Wilbur Moore was present, Chief Detective John Dailey was present, Attorney General, at that time, Earle Murphy was present.

Q. And prior to his making this statement to you all was he are you certain advised of all of his rights? A. He was.

Q. Did Deputy Moore to your knowledge take notes at the time this statement was made? A. Are you talking about Elliott's or Mitchum's?

Q. I am talking about Mitchum. A. Mitchum. Yes, sir.

Q. Did you happen to see the notes Deputy Moore took? A. I haven't seen them since then.

Q. Do you recall this as being the notes he took on 7-20-72? A. Yes, sir, it is.

The Court: Now, gentlemen, I take it the contents of the notes isn't material. It might be material——

[125] General Fisher: I am going to make, if it is permissible, a machine copy of the notes and make them exhibits to the testimony——

The Court: You gentlemen have already got copies of this, haven't you? I want the witness, while you are on that part of it, I want him to say if there were other oral statements made and if so who was present so that that will satisfy the statute just in case something comes up that you didn't anticipate.

General Fisher: All right. Well, first, did Mitchum make any other statements implicating himself in anyway with this crime than the one made on the 20th?

A. No, he did not.

Q. All right. As far as you know he did not? A. No.

Q. Now, directing our attention to Mr. Otis Elliott and were you present when Otis Elliott gave a statement implicating him in this murder of Neal McClary and which was taped by District Attorney General Earle Murphy? A. I was.

Q. All right. Now, was Mr. Elliott given his rights that you have previously described before? A. Yes.

[126] Q. And do you recall who gave them to him? A. The attorney general reminded him of his rights and asked him if he wished a lawyer present and he advised him of his rights and I advised him prior to leaving the county jail.

Q. All right. Now, Thursday night did you take Otis Elliott out of his cell? A. Yes, Sir, I did.

Q. Where did you take him? A. We took him to a scene where earlier Thursday he explained to us that they had abandoned a Buick Riviera, a cream colored Buick Riviera. We asked him earlier that morning if he could show us where it was at and he said he could. Now, this was earlier in the evening on Thursday and——

Q. Let me ask you this, let me interrupt just a moment, but prior to the written statement or the taped statement had Mr. Elliott given you a statement implicating himself in this crime? A. Right. He had given the same statement which the Attorney General taped earlier and told us of this car.

Q. Who was present when that was given? A. John Dailey and Deputy Wilbur Moore.

Mr. Derryberry: I didn't understand. I'm sorry.

The Court: John Dailey and Deputy Wilbur Moore.

[127] Q. What time Thursday was this statement received by you all? A. This was up in the afternoon. It must have been in the neighborhood of two o'clock.

Q. And when did you take him to the scene of the crime? A. It was that night. Since this statement we had attemtped to find this Buick Riviera but we were unable to locate it and in trying to find it we took him out of the cell and he was suppose to show us where they parked it. We drove up Keith Street to the Chevron station and he didn't recognize anything until we got to the Chevron station and he said, "This is the place that we changed cars."

Q. All right. Did you take him to a cemetery that night or any cemeteries? A. No.

Q. Did you assault him at any time? A. No, Sir.

Q. Did you break his upper plate? A. No, Sir.

Q. Did you know anything about it being broken? A. No, Sir.

Q. Did you ever notice any blood on his shirt? A. No, Sir.

Q. Did he ever complain to you about the treatment **[128]** he was receiving? A. No, Sir. He was complaining about his medicine to me and he kept wanting us to get him out of jail somehow.

Q. Okay. When you learned of his need for medicine, well, first, when did you learn that he was a diabetic? A. This was the day that he was arrested he told us he was a diabetic.

Q. And what did you do when you got this information? A. He gave me the name of a doctor in Chattanooga. After some time I did locate this doctor and I believe it was Smith or something, I don't remember the doctor's name, but I called him personally in public service and the doctor vaguely remembered him but he didn't remember the amount of medicine that he

was taking or anything. He couldn't give me any information on it.

Q. Okay. Was this on Wednesday or Wednesday night? A. This was Wednesday evening or late Wednesday afternoon.

Q. Okay. What other arrangements did you make after that to get medicine to him? A. Well, we couldn't determine what he was suppose to be taking and the doctor didn't really know if he was a diabetic or not and so I sent him to Bradley Memorial Hospital and had them to check him.

[129] Q. Were you present? A. No, I sent two other deputies. I believe Moore was one of them.

Q. All right. Did you shoot your pistol two feet from his head? A. No, sir.

Q. What would that have done to his ear drums if you had done that? A. Well, most likely——

Mr. Derryberry: Your Honor, I don't think——

The Court: That would be an opinion. I sustain the objection.

Q. When Otis Elliott made this tape statement did he appear to you be overly nervous or was he sweaty, excited and fidgety? A. No, sir. He was very calm.

General Fisher: That's all.

Cross-Examination by Mr. Colloms

Q. Mr. Neeley, again when was this arrest first made? A. This was Wednesday morning about nine o'clock, between eight-thirty and nine o'clock

Q. Between eight-thirty and nine o'clock. A. Yes.

[130] Q. When did you question Mr. Mitchum? A. Mr. Mitchum.

Q. Yes, the first time you questioned him. A. Well, at that time his name was Mitchum. He gave a false name. They all did. I forget what name he gave now but it was a false name, but we questioned him, it must have been about two o'clock that afternoon.

The Court: Jerry Wayne Alexander.

A. Yes, sir.

The Court: I notice that is on the indictment.

Q. About two o'clock. Was this out in the Sheriff's office? A. It was the Sheriff's office at the time, yes, sir.

Q. About two o'clock. And you and Deputy Moore and Mr. Dailey was there. A. No. This was the TBI agent Joe Helton, Mr. Kennedy, the criminal investigator, was there, Sheriff Cannon was there, Deputy Moore was there, John Dailey was there, and there was several there but that is all I remember right at the present.

Q. Who conducted the questioning? A. On that particular day TBI agent Joe Helton conducted the questioning.

Q. Did you ask any questions yourself? A. No, sir.

[131] Q. Was he fully advised of his rights at that time? A. Yes, sir.

Q. How was it explained to him? Read from a card or—— A. They were read from a sheet of paper that Mr. Helton, Mr. Helton read them from a sheet of paper that he had there.

Q. At that time before the questioning had Mr. Mitchum asked for an attorney? A. No, sir.

Q. Did he express any interest or concern at all for an attorney? A. No, sir.

Q. When did he get to make his phone call to his wife? Do you know? A. I am not sure. It must have been late Wednesday afternoon. I am not sure when he made a phone call.

Q. Was that after he was questioned? Had the questioning taken place first? A. Yes.

Q. Had he expressed a desire or had you all asked him if he wanted to make a phone call before you first questioned him? A. No, sir.

[132] Q. He had not. A. No.

Q. But you are positive that when he was first questioned he was fully advised of his rights. A. Yes, sir, he was.

Q. Did he make any kind of incriminatory statement or remark at that time? A. No, he didn't.

Q. Did he deny any knowledge of the crime? A. Yes, sir.

Q. Was he questioned again later on that afternoon or that night? A. Not to my knowledge, no, sir.

Q. The next day. A. I believe it was the next day that he sent the note that he wanted to talk to me.

Q. Was this in the morning or the afternoon? A. It was in the afternoon, late in the afternoon.

The Court: That would have been Thursday, the 20th. A. Yes, sir.

Q. Late afternoon. Sometime before dark. A. Well, it would have to have been late Friday afternoon, Thursday afternoon, and it had to have been after nine o'clock.

[133] Q. After nine o'clock. A. Yes, because nine o'clock Thursday night is when we took, or in the neighborhood of nine o'clock is when we took Elliott out of his cell to show us, we took him up there to show us where the car had been abandoned.

Q. You talked to Mitchum then before you left the jail? A. No, it was after.

Q. It was after—— A. After we returned with Elliott.

Q. When you questioned Mr. Mitchum. A. Right.

Q. You, Mr. Dailey, and Mr. Moore. A. Right.

Q. And was it before midnight? A. No, sir.

Q. It would have been after midnight. A. Yes, sir.

Q. So the date then probably should be the 21st, shouldn't it, rather than the 20th. A. It would have been on Friday morning I suppose

Q. The 21st. Did you wake him up out of his cell? A. No, sir.

Q. He was awake. A. Yes, sir.

[134] Q. Who conducted the investigation this time, or the questioning? A. There were no questions asked. He just made a statement and told all what had happened.

Q. Well, what happened when you came and got him out of the cell? Did you take him to this—— A. We took him to the Sheriff's office.

Q. The unit outside. A. Yes, sir.

Q. And what did you say, "What do you want to tell us?" or something like that or what? A. Well, I asked him, I said, "You sent me a note. What do you want to tell us"?

Q. Is that when he broke down and came forward with all this stuff? A. Yes, sir.

Q. Did you advise him of any rights at that time? A. I reminded him of his rights, I did.

Q. Did you tell him he didn't have to? A. Yes, sir.

Q. Did you sort of lead him along in any manner? A. What do you mean by leading him on?

Q. Did you tell him that if you were in his position you would tell all about it and that it would go easier for him and anything like this? **[135]** A. No, sir, I did not.

Q. And how long did this questioning last? A. Oh, It must have been about forty minutes.

Q. And these notes that you made a part of your exhibit are the ones that Mr. Moore made. A. Yes, sir.

Q. About a page and a half. Is that right? A. Something like that, yes.

Q. And it took forty minutes for him to tell you that much information. A. Well, you said how long did the total thing take. It didn't take forty minutes to say that, no, sir.

Q. What happened to the rest of the forty minutes? A. Well, the man said that he needed some help, he said he wasn't going to suffer this alone and several other things took place.

Q. Was this all before he started telling you the details? A. Yes, sir, it was.

Q. He made a preliminary remark as to why he was telling or was going to tell you this information? A. Yes, sir. I just told you he said he wasn't going to take it alone.

Q. That's what took forty minutes, the whole process. A. I suppose so, yes.

[136] Q. Now, was he questioned any other time? A. No, sir.

Q. Just those two occasions. A. That is the only two that I know about.

Q. And the first time you questioned him no statement was made. A. No, sir.

Q. At the first time you questioned him, well, did you ask him any questions at all? A. No, sir.

Q. What did you ask him that first time? A. I just said I didn't ask him any questions.

Q. The first time in the day about two o'clock——

The Court: You have already asked him that two or three times, Mr. Colloms. He said Mr. Helton asked the questions.

Q. Mr. Helton. A. Yes.

Q. You were present there when the questions were asked. A. Yes, I was.

Q. What kind of questions did Mr. Helton ask him?

The Court: Well, I doubt if that is material. If you are asking if Mr. Helton fully advised him of his rights that is material.

[137] Mr. Colloms: That's true too, your Honor, but if he asked him questions concerning this crime and if Mr. Mitchum made any response that certainly goes to show——

The Court: You have already asked him and he said he denied any knowledge whatsoever of this crime and that is already in the record.

Q. And have you heard him ask for a lawyer up until this second questioning? A. He made the statement that he would like to get him a lawyer. We were in the process of taking him back the first time that he was questioned by Mr. Helton, and we were in the process of taking him back to his cell and he said he would like to see about getting a lawyer and we asked him who he wanted and I believe he said Brown or some lawyer in Chattanooga, I am not sure what the name was, but he said he would like to talk to him and that was the only statement he made about a lawyer.

Q. And did you all make a call or—— A. He said that his mother or somebody was going to make arrangements to get this lawyer up here.

Q. And this was in the afternoon the first day of the arrest. A. Right.

Q. And you all went ahead and questioned him **[138]** the second time even though you knew he had expressed an interest in having a lawyer? A. Well, he requested it the second date. He sent a note to us wanting to talk to us.

Q. When these gentlemen were arrested that day their appearance, their hair, was it any different at that time than it is now? A. Yes, sir, it was.

Q. How was their hair? A. Well, it wasn't as neat as it is now.

Q. Did one of them have slick hair, looked like it had been greased and slicked down? A. Well, I couldn't say it had been greased. It just wasn't as neatly fixed is all. It was all messed up and out of place.

Mr. Colloms: That's all.

Cross-Examination

By Mr. Derryberry:

Q. Officer Neeley, were these individuals stripped at the time they were first arrested? A. When they were first arrested and put in jail they were, yes, sir.

Q. And you were present I think you testified when Mr. Elliott was questioned the first time? A. Yes, sir.

[139] Q. He didn't say anything that time? A. No, sir.

Q. And you gave him his warning of his rights at that time? A. No, I didn't. The first time.

Q. Yes. A. The first questioning.

Q. Yes. A. No, I didn't. TBI agent Joe Helton did.

Q. Did you hear him? A. Yes, sir, I heard it.

Q. Did you at any time though give him a warning of his rights? A. Yes, sir. Well, not him. At the scene where they were arrested Sergeant Allison of the Tennessee Highway Patrol read all three of them their rights.

Q. So you never yourself actually as far as Elliott is concerned explained his rights to him. A. Not at the first or second time they were read to him but at the time he gave the statement I explained his rights to him.

Q. What did he say? A. Just what I read off awhile ago.

The Court: He said what did he say?

Q. What did he say? Well, whatever your testimony **[140]** was before verbatim that is your recollection of what you said to Mr. Elliott. A. Well, I read it off of the rights form down there.

Q. Oh, you read it off this card. A. Yes, but it wasn't a card. It is a full sheet of paper that is called a rights form.

Q. Was there anybody at the jail when these people were brought back? Were there people around? A. Oh, I guess there were ten or twelve people there, yes, sir.

Q. The word had gotten around about this crime. A. Well, now, these people that were there were law enforcement agencies, the Sheriff, the officers involved in the arrst, the jailer, people there at the jail, and I think maybe there were three fireman out in the yard that came across the street at the firehall.

Q. Has there been any unusual gathering at the jail since these individuals were put in there? A. No, sir.

Q. Not at any time. A. No, sir.

Q. Now, this doctor, you took him to the hospital and this was on the first night.

The Court: I believe he said he sent him.

[141] A. I sent him. I didn't take him.

Q. You wasn't present at the hospital. A. No. I was at the jail when he left. I sent him.

Q. And it is your memory that the doctor's name in Chattanooga is Smith? A. That is the best I can remember. I don't

remember the exact name but he gave me the doctor's name and I called long distance information and got the number and talked to the doctor.

Q. But the best of your memory his name was Smith. You have been in here through this entire hearing today, haven't you? A. Yes, I have.

Q. Now, there is also a defendant in this case named Johnson. Is that true? A. Yes, sir.

Q. And did you ever question Mr. Johnson?

General Fisher: Your Honor, I don't see how that could be material.

The Court: I sustain the objection.

Mr. Derryberry: I will link it up, your Honor.

General Fisher: I think he ought to link it up before he goes into it.

The Court: Well, let me hear the question. I **[142]** don't see how it could be material but let him answer it.

Q. There is a defendant in this case by the name of Johnson. A. Yes, sir.

Q. All right. And of course you know he has an attorney. A. Yes, sir.

Q. And he had had one for quite awhile. A. Yes, sir.

Q. And you never questioned him, did you? A. Yes, sir.

Q. You did question him? A. Yes.

Q. And did you get any answer from him? A. No, sir.

Q. He made no statement? A. No.

Mr. Derryberry: That is all I wanted to ask, your Honor.

The Court: I don't see how it is material but that is all right.

Q. Now, you actually did take the defendant Otis Elliott outside the jail on that night that he has testified to? **[143]** A. On Thursday night.

Q. On the night he testified about, Thursday night. A. We took him out on Thursday night, yes, sir.

Q. Who was with you? A. Myself and Deputy Wilbur Moore and Detective John Dailey.

Q. Three of you. A. Yes, sir.

Q. Were you armed at the time? A. Yes, sir.

Q. What did you have? A. What did I have?

Q. Yes. A. I had an automatic weapon.

Q. An automatic pistol. A. Yes, sir.

Q. Was there a shotgun in the car? A. No, sir.

Q. Just your pistol. A. Well, I suppose the other officers were armed.

Q. Oh, they were armed too. And about what time of the night was this when you took him out? A. It was in the neighborhood of nine o'clock P.M.

Q. How long had you been on duty at that time? A. About thirty-six hours.

[144] Q. You had been steadily on duty for thirty-six hours? A. Yes, sir.

Q. Straight. A. Yes, sir.

Q. I guess you were pretty worn out and tired, weren't you? A. Yes, sir, I was.

Q. Why this particular time? Strike that question. If you had been on duty for thirty-six hours and Mr. Elliott was in custody and you didn't take him out before that night. Is that correct? A. That's correct.

Q. He was in custody that entire time. He was available, wasn't he? A. He was.

Q. When it was daylight you could have taken him out and seen that car, couldn't you? A. Yes, sir.

The Court: Now, let him explain that if he has a way to explain it. He was asked that awhile ago.

A. That afternoon he sent a note down wanting to talk to us and he had given us this information about the extra car which we hadn't found at this time during the investigation, **[145]** the Buick Riviera. This was, I suppose it was in the afternoon around two o'clock that we had talked to him this time. From two o'clock until late that evening in two cars, myself and Moore and John Dailey assisted in another car, we attempted to locate this abandoned car this Buick Riviera. We searched the area from Cleveland to Charleston, to the river at Charleston up there and the McMinn County line. This took some time because we had searched all the roads. By this time I suppose it was seven or seven-thirty. We came back and ate supper and decided that maybe he could show us the exact spot the car had been abandoned and we went and got him and took him up there to the Chevron station where he was supposedly waiting there and he showed us the direction from there that they went, but we still didn't find the car.

Q. Did you ever find it? A. Yes, sir, we did.

Q. Where did you find it? A. We found it Friday I believe it was, or maybe it was Saturday. A city officer unaware of the fact that this car was involved in this incident had had the car pulled, the car had been abandoned on the road that they took to Charleston, and it had been abandoned next to I-75 underpass up there and a city officer had had it pulled off the right-of-way there.

Q. So he gave you a note about two o'clock and **[146]** told you where to look for the car? A. It would have been

in the neighborhood of two o'clock. He sent us a note that he wanted to see us and then he told us about it.

Q. And then you came back and took him out at nine o'clock that evening? A. Yes, sir.

Q. While you were out with him did you see a green pick-up truck? A. I don't remember. I suppose we might have seen several trucks but I don't remember a particular truck.

Q. Do you recall stopping or one of the three officers among you talking to a guy in a pick-up truck? A. No, sir, I don't.

Q. Is it possible that it happened and you don't recall it? A. Yes, sir, I suppose it is possible. I suppose it is.

Q. Now, what time of day was it when Elliott was interrogated at the time his remarks were taken down on tape? A. This was in the neighborhood of midnight. I know that we got Attorney General Earle Murphy out of bed.

Q. You got him out of bed. A. Yes, sir.

[147] Q. He came down there from his home. A. Yes, sir.

Q. Is it possible that it was after midnight? A. It could have been. I don't remember the exact time. I know it was getting late.

Q. In other words, if the Attorney General has said before that it may have been very early the next morning then you wouldn't dispute that, would you? A. No, sir.

Q. How long, Elliott had been arrested then on the 19th, that morning? A. Yes, sir.

Q. You say about nine o'clock. A. Yes, sir.

Q. And this statement that was transcribed and finally taken down was in the very early morning hours of the 21st. A. It would have been Friday morning if Friday is the 21st.

Q. Almost forty-eight hours. A. Yes.

Q. Of course Elliott had not seen a lawyer at any time during that interval, had he? A. Not to my knowledge, no, sir.

Q. And he had not had a dosage of insulin during **[148]** that time to your knowledge, had he? A. Not to my knowledge, no, sir.

Q. And except when you and two other officers took him out of the jail he was in custody there in the Bradley County jail? A. Yes.

Mr. Derryberry: I think that is all.

Cross-Examination by Mr. Colloms

Q. I would like to ask one other question. The written statement that was made by Mr. Elliott, was it made before or after this statement made by Mr. Mitchum? A. Before.

Mr. Colloms: That's all.

Cross-Examination by Mr. Derryberry

Q. One other question. Do you remember what time you brought Elliott back after you had taken him out? A. It must have been around one or one-thirty on Friday morning.

Q. So you had him out then from nine to one-thirty the next morning. A. No, this is just an estimated time. I don't know the exact time.

Q. Well, I mean in your estimation it was from **[149]** nine to one-thirty. A. Yes, sir.

Mr. Derryberry: That's all.

The Court: You may come down. Who do you have next?

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MR. WILBUR MOORE,

a witness for the State, was called and being duly sworn, was examined and testified as follows on

Direct Examination

By Attorney General Fisher:

Q. You are Deputy Wilbur Moore. A. I am.

Q. Are you the only black deputy employed by the Bradley County Sheriff's Department? A. I am.

Q. And were you so employed in July of this year? A. Yes.

Q. And as a deputy sheriff did you have cause to investigate the murder of Neil McClary in Bradley County? A. Yes.

Q. And in the course of that investigation did you interrogate the defendants here Elliott and Mitchum? A. Yes, sir.

Q. All right. Now, I will direct it first to **[150]** your interrogation of the defendant Mitchum. Do you recall how many occasions you were in on the interrogations or questioning of him? A. I think twice.

Q. On those two occasions to your knowledge was his rights read to him? A. Yes.

Q. Do you recall who read his rights to him? A. I don't think. I think the first time it was between attorney general, ex-attorney general Murphy or TBI agent Helton. I am not for sure. I don't know which one of them did it.

Q. Can you remember any occasion in which you were questioning him or discussing this case with him to any extent that someone, some officer did not explain to him or advise him that he had the right to remain silent and the other rights that are on the rights form sheet as you all call it? A. I didn't understand the question.

Q. On every occasion that you talked with Mr. Mitchum did some law enforcement officer explain his rights to him? A. They did.

Q. Did you ever hear Mr. Mitchum demand an attorney before he was questioned? **[151]** A. No.

Q. Do you know whether or not Mr. Mitchum or Mr. Elliott either one sent messages out that they would like to talk to the law enforcement officers? A. On two occasions I know of they wanted to talk to Neeley.

Q. All right. Which one? A. It was Elliott.

Q. Now, speaking as to Elliott were you present when he made his statement? A. Yes.

Q. And did he first make an oral statement and later make an oral statement which was taped by District Attorney General Earle Murphy? A. Yes.

Q. On both of these occasions were his rights explained to him, the right to remain silent, the right to have to a lawyer and to stop talking any time he wished? A. Yes, Sir.

Q. The other rights which I believe you heard Officer Neeley read were customarily read to a person charged with a crime? A. Right.

Q. All right. Now, was the statement given to you or given in your presence done voluntarily?

[152] Mr. Derryberry: That calls for a conclusion, your Honor.

The Court: I sustain the objection.

Q. Was there any coercion put on either the defendant Mitchum or the defendant Elliott by yourself or any other officer in your presence? A. No, Sir.

Q. Did you take the defendant Elliott out to a cemetery? A. No, I didn't.

Q. Late one night. A. No, I didn't.

Q. Did you see anyone beat him anywhere? A. No.

Q. Did you see anyone shoot a pistol two feet away from his head or anywhere around him? A. I did not.

Q. Now, about his medicine, did you make any effort to obtain insulin for Mr. Elliott? A. I did. I went out of my way.

Q. All right. When and to what extent did you go to get him medicine? A. Well, the first time his mother brought some medicine and a dollar bill up and I carried it down there to him.

[153] The Court: What day was that?

A. I guess it might have been two days later after they were brought to the Bradley County jail.

Q. Okay. Did he take his medicine at that time? A. I don't know. I gave it to him. And on another occasion, he stood here in this courtroom and said that he hadn't been getting his medicine and I made my rounds on Sunday to ask all inmates if they had had their medicine or not and his mother was there at the time and I see several other people in the courtroom audience that was there.

Q. Was this the Sunday after his arrest? A. Yes.

Q. Do you know of his own personal knowledge if he has gone on an insulin strike and he refused to take his insulin atfer he was brought back to the Bradley County jail the second time? A. I do.

Q. All right. How long did he go without taking his medicine this time? A. I would say three or four days. I don't know, and maybe five days.

Q. Okay. And how was he finally induced to take his medicine? A. I don't know.

[154] Q. One other question, when he was brought back to the jail, I am talking about when Elliott was brought back to the jail that night where was Mitchum? A. They were in separate cells. I think Mitchum was on the top floor, I mean center floor, and Elliott was in the basement I believe. I am not for sure.

Q. All right. When Elliott was returned to his cell in the basement was there anyway Mitchum could have seen him when he was brought back in? A. Not from the cell Mitchum was in. I am pretty sure he was in the center drunk tank, what we refer to as the drunk tank.

General Fisher: Okay. That's all.

Cross-Examination

By Mr. Derryberry:

Q. Are you pretty sure that he couldn't be seen? A. Yeah, pretty sure.

Q. You are not absolutely sure, are you? A. No, not absolutely sure.

Q. As a matter of fact some or all of these prisoners have been moved around in the jail from time to time, have they not? A. Yes, because we don't have enough space down there. We have other people there.

Q. Well, it is necessary from time to time where **[155]** you will take a prisoner out of one cell and put him in another one or put him in the drunk tank? A. Yes, but on this occasion these fellows were placed in cells by themselves.

Q. Well, my question was it is necessary from time to time to move prisoners from one cell to another cell? A. Yes, it is.

Q. Now, you are not absolutely sure what cell Mitchum was in at the time Elliott was brought back in, are you? A. No, I am not.

Q. All right. Now, do you have any special responsibilities at the jail. You said you were making your rounds. Are you at the jail constantly in your duties? A. Well, I am pretty dedicated to my work and as far as these guys are brothers to me, I don't mean for that to mean anything, but——

Q. Are you a jailer or—— A. I am a deputy sheriff.

Q. All right. And you were or are at the jail there a good part of the time you are on duty? A. Yes, I am.

Q. Now, as far as the period of time that Elliott went without his insulin I think you testified you don't know how long it was. Is that correct? **[156]** A. This last time he was brought to the Bradley County jail?

Q. Yes.

The Court: Are you referring to this last week now?

Mr. Derryberry: The time he went without his insulin——

The Court: There were two different times——

Q. The last time then. A. It, the boy wouldn't eat anything or take his medicine and I would say it was between four and five days. I am not sure.

Q. Were you present when Elliott was taken out of jail to go, I think your testimony was to go look for an abandoned car? A. Yes.

Q. And that was from about nine o'clock on to one-thirty? Would you agree pretty much with the other officer's estimation? A. Somewhere along in there.

Q. You didn't find the car, did you? A. No, we didn't.

Q. And you had spent all day, or since about two o'clock he said, looking for the car? A. Yes, at about one-thirty or two we started **[157]** looking for it.

Q. And then at that time or two o'clock right after Elliott had said where the car was you were unsuccessful in finding

the car on up until that night and you looked the entire time. Is that right? Do you agree with this testimony? A. Yes.

Q. You got Elliott out and it was to show you where the car was? A. He said he would.

Q. And you still looked around until one-thirty in the morning? A. No. There was a lot of time taken up that evening.

Q. Sir? A. There was a lot of time taken up. He went to the hospital. Neeley went to the hospital to get him some medicine. He said he wanted some medicine.

Q. Oh, he went to the hospital the second night. A. Well, the night that we took him out he was suppose to show us where the car was. Well, we bought him a hamburger and a cold drink or something like that and he wanted some medicine. He said there wasn't anybody that would believe him, that he was a diabetic and I don't know what had happened earlier, whether he had been examined or not.

Q. Did you take him to the hospital the second **[158]** night? A. I didn't. The second night?

Q. Yes. The night you took him out to look for the car. A. Yes.

Q. You took him to the hospital Wednesday night and Thursday night? A. I don't know what day of the week it was.

Q. But you were there while he was taken to the Bradley County Memorial Hospital on Thursday night? A. If this incident was supposed to have happened Thursday night I guess it was. I was there.

Q. Well, don't you know which night it was? A. No, I don't.

Q. So you weren't looking for the automobile the entire time you were out? A. No, and we were driving slow. There is a lot of time burning there.

Q. And you went to the Chevron station where he said the car was? A. Yes.

Q. How far is that? A. From the jail I would say it is about two miles.

Q. Two miles. **[159]** A. Right, with stop lights, and traffic.

Q. Did you go to the hospital before or after you took him to the Chevron station? A. Afterwards.

Q. How long was he in the hospital that second time? A. I don't know. I guess we sat there about thirty minutes I guess.

Q. You sat there. A. Yes.

Q. Didn't you go inside? A. Well, Neeley went inside to see about getting him some medicine.

Q. I believe Neeley testified, didn't he, that he couldn't have any insulin unless the doctor said he could, didn't he? A. No, I don't know anything about that.

Q. Isn't it true that the doctors did not give him any insulin on the first night? A. I don't know a thing about that.

Q. Did Neeley bring any insulin back out to the car that night? A. Not to my knowledge.

Q. He was inside the hospital thirty minutes. A. I can't say exactly thirty minutes. Maybe it **[160]** was fifften minutes or so.

Q. And he didn't bring anything back out to the car? A. I don't remember seeing anything.

Q. Where did you go after you left the hospital? A. I asked him if he was on the leven, if he was going to tell the truth and he said, "Yeah, but I don't want to go to the Bradley County jail." I said, "Why?" He said, "I don't want Mitchum ——

Q. My question was where did you take him? A. We took him to the city jail.

Q. You took him right back to the city jail after you left the hospital? A. Yes.

Q. You mean the city jail or the county jail? A. The city jail.

Q. So you, it took you about four and a half hours to go to the Chevron station and the hospital for thirty minutes and back to the jail. A. No. Time was burnt. He took us to bridges, all kinds of bridges up towards Charleston, everywhere. He just took us everywhere.

Q. He took you. A. Yeah, the guy that was running the car. I was in there too.

[161] Q. You were following his verbal directions. A. Yes.

Q. Then entire night. A. Yes, Sir.

Q. When did you drive around on these different occasions, in other words, when you went under all these bridges and so on was this before you took him to the hospital? A. Yes.

Q. Where is the first place you took him? A. When we left the jail?

Q. Yes, when you left the jail at nine o'clock. A. We went, we hit Keith Street and went up towards the scene of the incident.

Q. Did you ever stop at a field? A. A what?

Q. Did you stop at a certain field? Did you stop anywhere? A. No, we didn't.

Q. Not that you know of. A. No, we didn't.

Q. All right. Was the first place you went that night the Chevron station? A. Well, that is where he had us, he was going to show us where he had——

Q. Was that the first place you went? **[162]** A. Yes.

Q. Then did you go out looking again or straight to the hospital from the Chevron station? A. No, we went on looking further for the car that was supposed to have been lost.

Q. To the best of your memory what time was it when Officer Neeley went in the hospital? A. I don't know. I can't say positively.

Q. Was it shortly before you took him right back to the jail? A. Yes.

Q. So it must have been around, well, how long before the time when you took him back to the jail was it? A. I don't quite understand the question.

Q. I think you testified that as soon as you left the hospital you took him back to the jail? A. Yes.

Q. You took him to the Cleveland City jail? A. Yes.

Q. But you took him away from the Bradley County jail? A. Yes.

Q. What was he doing back at the Cleveland City jail? A. Why did he go to the city jail?

[163] Q. Yes. A. He said he didn't want Mitchum or any of the other guys to know.

Q. Did he stay at the city jail that night? A. Well, until after the Attorney General came there and took a statement and then he went back to the county jail.

Q. The Attorney General took the statement at the city jail. A. Yes.

Q. So you went straight from the hospital to the city jail. How long does it take you to get from the hospital to the city jail? A. I would say fifteen fifteen minutes.

Q. Fifteen minutes. Do you remember what time you got to the city jail? A. No, I don't.

Q. It was about one-thirty, wasn't it? A. I don't know.

Q. I thought you testified you agreed with Officer Neeley's estimate there. A. I said I don't know.

The Court: There is a confusion here. I am confused. Now, if you are talking about what time they got back to the county jail that is a little **[164]** different thing than what time they got to the city jail. You have got to make that straight in your question or we all are going to be confused. Now, as I understand his testimony there is a short stay at the city jail before they got back to the county jail.

Q. How long were you at the city jail?

The Court: Well, how long was he there.

Mr. Derryberry: Well, I am asking him, your Honor, how long he was at the city jail.

The Court: Okay.

A. I guess in and out and going up and drinking coffe I guess, well, I stayed till the investigation the whole time, an hour or two hours maybe.

Q. Can you not remember, Sir, approximately what time it was that you stopped by the hospital and Officer Neeley went in? A. No, I can't.

General Fisher: Your Honor, he can't be anymore specific than he has been. He has asked——

The Court: Yes, I sustain the objection. He has already ask him that.

Q. Do you remember what time you arrived at the city jail? I don't think I have asked you that. A. You asked me. I don't know.

[165] Q. Well, it is your testimony that sometime between about ten o'clock and one-thirty that Officer Neeley went to the hospital and tried to get, went inside the hospital and tried to get Elliott some insulin. Is that correct? A. He went to see a doctor. I don't know what for. Elliott said he wanted some medicine or something. I didn't go inside.

Q. Were you armed that night? A. Yes, I was.

Q. What did you have? A. A magnum, a 357 magnum.

Mr. Derryberry: That's all.

Redirect Examination

By General Fisher:

Q. Mr. Moore, can you identify the gentleman seated against the wall? A. Yes.

Q. Who is that? A. Larry Jones.

Q. And were you here when Mr. Elliott identified Larry Jones as being in the car with you all that night? A. Yes.

Q. Was Mr. Larry Jones with you in that car? A. No.

[166] General Fisher: That's all.

The Court: All right, Mr. Colloms, you may cross-examine.

Cross-Examination

By Mr. Colloms:

Q. Mr. Moore, how many times were you in the presence of Mr. Mitchum when he was being questioned about this? A. Mr. Mitchum?

Q. Yes. A. Twice.

Q. Twice. Was the first time about two o'clock the afternoon following the arrest that morning about eight or eight-thirty? A. It might have been later than two. I stayed at the scene where we had captured these guys. I stayed there all day long.

Q. All day long. A. I came down about one-thirty I guess.

Q. But you remember specifically being in the presence of Mr. Mitchum and all these other officers when he was questioned

the afternoon following the arrest that morning. Is that right? A. Yes, sir.

Q. Regardless of what time it might have been that **[167]** afternoon. A. Yes.

Q. And there were a number of officers present there. Isn't that right? A. Yes.

Q. And it was TBI agent Mr. Helton that conducted the first questioning. Is that right? A. Yes.

Q. And you have been an officer now for several months. A. It will be two years.

Q. Two years. You I guess have these rights memorized. You don't need a sheet of paper to read from to fully disclose and advise somebody of their rights, do you? And if Mr. Helton had made a mistake and not fully advised Mr. Mitchum of his rights would you have caught it? A. No, I wouldn't.

Q. You would not. A. No.

Q. How long did this initial conversation with Mr. Mitchum take place? A. How long?

Q. How long did it take place? A. I guess an hour.

Q. A hour. All during this hour did Mr. Mitchum **[168]** deny any knowledge of this crime? I don't really understand your answer. A. No, he did not deny his knowledge of the crime.

Q. Well, are you saying then that he expressed some knowledge of the crime at the first questioning? A. What crime are you talking about?

Q. The shooting of Mr. Neil McClary. A. Yes.

Q. He indicated he knew something about it the first time you questioned him. A. I think so. I think it was the first time.

Q. Nothing was reduced to writing this first time though. A. I think that is when I took the statement. The second time he

came in, I am not for sure but the second time he was brought down Joe Helton was talking to him again and he didn't want to make a statement until he got an attorney.

Q. The second time. A. Yeah, I think it was the second time.

Q. When was the second time? Was it the same day or a day or two later? A. A day or two later, I don't know.

Q. At that time he said he didn't want to talk without having talked to a lawyer first. A. Yeah.

[169] Q. But you think the first time the TBI agent did talk to him he made some kind of incriminatory statement? A. Attorney General Earl Murphy was there. I think Joe Helton came in later after Mr. Mitchum had made the statement.

Q. This was the afternoon following the arrest that morning. This is what we are talking about right now. A. Yes.

Q. And you think Mr. Murphy was present. A. I know he was present. I am sure he was present.

Q. You are sure he was present. A. Yes.

Q. And TBI agent Helton was present? A. Yes.

Q. And this questioning lasted about an hour. A. I guess.

Q. Approximately. A. Yes.

Q. And incriminatory statements were made by Mr. Mitchum. A. Yes.

Q. And you think that this is probably reduced to writing. Somebody made some notes. A. I made notes.

[170] Q. You made some notes of it. A. My own personal notes.

Q. Do you know where those notes are? A. Yes.

Q. Can you furnish us with copies of them? A. Yes.

Q. Are those notes different than your notes right here? A. No, that is the notes I took.

Q. Well, this is dated the 20th and the arrest was on the 19th. Are these the only notes you made? A. No, I have got papers scattered around everywhere.

Q. Could you try to find us the notes you made the first day and furnish us with copies of them? A. Yes, sir, I guess.

Mr. Colloms: Could we have a directive of the Court of some sort?

The Court: No, I would doubt that he would be required to. If he made notes they are not admissible. It is his own notes. There would be no reason he would have to furnish you a copy of them.

Mr. Colloms: Your Honor, I would like to argue that——

The Court: Well, I will overrule you on that **[171]** part of it. Now, they have furnished you a copy of notes that was made sometime or another. That is all the attorney general has and I am not going to require anything further. If they have got them why they can furnish them to you.

General Fisher: May it please the Court, I have given them all notes that I have been able to secure to date. If there are additional notes I will look for them and make them available.

Q. Let's get on to the second day, which would be the night of the 20th and the morning of the 21st. The night of the 20th Mr. Elliott had been taken out of the cell and you all spent four hours or so talking with him in various places, and if I understand correctly, you have talked with him at the city jail and obtained a statement from him there——

General Fisher: May it please the Court, this is Mr. Mitchum's attorney——

Mr. Colloms: I am just trying to get the time straight, your Honor.

The Court: Well, go ahead, but let's don't spend a lot of time on it because he has already been asked that. Go ahead.

Q. Now, what I am getting at, it was after the statement was made by Mr. Elliott in the presence of the **[172]** attorney general at the city jail and that statement had already been obtained before you talked to Mr. Mitchum the second time. Is that right? You had brought Mr. Elliott from the city jail and placed him back in the county jail. Is that right? And then you took Mr. Mitchum out of the jail and talked to him the second time. A. I think so.

Q. Now, was Mr. Murphy present for this second questioning? A. I think he was. He quoted him his rights.

Q. You think Mr. Murphy did. A. Yes. Well, I am not for sure whether it was Helton or Murphy. I don't know which one.

Q. And this was getting fairly late into the morning. A. I guess so.

Q. And to your knowledge are these two occasions the only time that Mr. Mitchum had been questioned? A. Yes.

Q. Or at least the only two times you have been involved? A. Yes.

Q. When, if at any time, did Mr. Mitchum ask to be permitted to call an attorney or have one appointed for him or to get him one or anything along that line? **[173]** A. When did he? I couldn't tell you.

Q. Were you in his presence when he called his wife in the jail the day he was arrested and asked that she get a lawyer? A. I think so. They like to run me to death making phone calls, up and down the stairs.

Q. So you know then that the very first day he wanted a lawyer. Is that right? A. No, I don't know that. I sure don't.

Q. Did he ask you to try and get him one? A. No, I didn't have much to say to him.

Q. And before any of these questionings he made no desire, made no expression at all, which would make you believe he wanted a lawyer present. Is that right? A. Not at the first time.

Q. The first time. A. No.

Q. How about the second time? A. Yes.

Q. He said he wanted a lawyer. A. I am pretty sure he did.

Q. And did he refuse to answer anything this time? A. Well, he just said he, can he see an attorney first. That is all he said. I remember those exact words.

Q. Did the questioning continue, did you all **[174]** continue to ask him questions? A. No, we did not.

Q. You all cut the examination off. A. That's right.

Q. So it is your testimony then that this statement that you made notes here from was obtained the first time you questioned him. A. Yes, sir.

Mr. Colloms: Thank you.

Mr. Derryberry: I have just a couple more questions, your Honor, if I may.

The Court: All right.

Recross-Examination

By Mr. Derryberry:

Q. Where did you stop and get the hamburger and coke? A. We did not stop. We brought him to the city jail and——

Q. Is that where you got the hamburger and coke?

The Court: Well, let him finish.

A. One officer, I think it was Detective Neeley or one of the city officers asked him if he would get him a hamburger

or something, asked him what he wanted and he said a hamburger or cheeseburger or something like that and they got him a cold drink. The officers in there offered him **[175]** something to drink. He ate down at the jail.

Q. So that wasn't while you were out driving around, was it? A. What did you say?

Q. He got this in jail. This was not while you were out driving around.

The Court: He just said that. If he bought it at the jail it couldn't have been while he was riding around. There is no use in asking that question. He just got through saying he——

Mr. Derryberry: I'm sorry, your Honr.

The Court: Well, there is no use in asking the same question a different way each time.

Q. You never fired your gun that night, did you, Officer Moore? A. No, sir.

Mr. Derryberry: That's all.

The Court: You may come down.

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MR. EARLE MURPHY,

a witness for the State, was called and being duly sworn, was examined and testified as follows on

Direct Examination

By General Fisher:

Q. You are Earle Murphy. **[176]** A. That's right.

Q. And you are an attorney. A. That's right.

Q. And you are the former attorney general of this district? A. That's right.

Q. And you were acting as such in July of this year? A. Correct.

Q. Now, you have sat here and heard the testimony of the officers. Is that correct? A. Yes.

Q. And were you ever present during an interview of Mr. Mitchum? A. No.

Q. So you have not had any discussion about this case with Mitchum? A. No. I never saw Mitchum but one time and that was when they conducted a line-up down there for Mr. Ed Lewis.

Q. All right. Was Mr. Mitchum at that time requesting an attorney be present prior to the line-up? A. As I understood, I was down at the jail most of that day and I was told by Mr. Neeley that he had gone back and advised all of the defendants of their rights and **[177]** that they all said that they didn't want to make a statement. Now, as far as requesting an attorney I don't know because the Supreme Court now holds that you don't have to have an attorney present at line-ups. I don't think they were asked if they wanted an attorney at the time of the line-up.

Q. All right. Now, were you present when a statement was given and recorded, a statement by Mr. Otis Elliott? A. Yes.

Q. And did you record that statement? A. I did.

Q. And did you reduce that recording or parts of that recording pertaining to his participation in the murder to Neil McClary to writing? A. I reduced the entire recording to writing, yes.

Q. All right. Now, prior to the recording of this statement was Mr. Elliott given his rights? A. He had been advised of his rights in my presence the day before that by Mr. Helton down at the county jail and he made a statement either at that time or shortly thereafter explaining why he was under this house in

Charleston. Now, he never implicated himself in any manner with the robbery and murder but he attempted to explain some friends of his put him under this house and he was under there when Mr. Mitchum and I believe a fellow by the name of Robarr or **[178]** Arnold or whatever his name was, but he was under there when they came busting in and this was the day before that. I was down there and he sent word down that he wanted to make a statement and he came out and that is what he said at that time. And then on the night in question, this was about, well, I was waiting for my wife to come in. She had gone to middle Tennessee to pick up my youngest daughter and it was around eleven o'clock when I was called. I think Mr. Neeley called me. I went down to the city jail and so it was a few minutes after eleven when I got there. I asked Mr. Elliott if he had been advised of his rights and he said, "I have." And I said, "Do you want to make a statement?" He said, "I do." And I know personally that he had been advised of his rights by Mr. Helton previous to this. I did not advise him because I do not carry a rights card with me. As I recall in this room there is a large placard with these rights on the wall in there in plain view of all parties. I do know that he was advised of his rights and I asked him if he had been and he said he had been and I asked him if he wanted to make a statement and he said he did and I took his statement.

Q. And he gave that statement to you voluntarily? A. Right.

Q. Was he nervous, fidgety, sweaty? A. No, he didn't appear to be nervous. His voice **[179]** was lower than it was today. I would have to say that. I could understand him better today than I could that night. I would have to say his voice was lower, but as far as being or appearing to be strained or nervous or anything like that, no.

Q. Did he have on a white t-shirt? A. He did. He had on a white t-shirt and a pair of jeans or casual pants, and as I recall

he didn't have any shoes on. I may be wrong about that but I don't recall him having any on.

Q. Do you recall any blood or did you notice any blood on the t-shirt? A. I didn't see any blood on his t-shirt.

Q. Did he have all his teeth in? Do you recall? A. No, I didn't examine his mouth for teeth.

Q. You didn't notice his mouth being swollen? A. No. I didn't see anything out of the ordinary about him.

General Fisher: Thank you, Mr. Murphy.

Cross-Examination

By Mr. Derryberry:

Q. You say that Mr. Elliott's voice was lower than it was today? A. Yes, it was lower than it was today.

Q. Was he very hard to understand? **[180]** A. No.

Q. Well, you found him easier to understand today than you did at that time? A. Well, yes. There may be reasons for that. Of course in a police station, we were back in what I guess they call the detective's room, I don't know that much about their jail down there, but at the same time there was a radio dispatcher in the next room and he was talking and other people talking outside, whereas in here today it is quiet.

The Court: Are you aware, Mr. Murphy, that his voice was amplified?

A. Yes, sir. And also it is amplified here today. There was outside noises down there at the time and it is easier to understand in here than it was down there.

Q. Yes, sir. Now, who actually took the tape and typed it down? A. I did.

Q. You did that personally. A. Yes, sir.

Q. And I believe it was about eleven o'clock—— A. It was about eleven o'clock when they called me and I would say it was about one o'clock when I got home. I went home after I took Mr. Elliott's statement. I didn't go to the jail or any place with them.

[181] Q. But they indicated to you that he was ready to make a statement. A. They called me and said at the time that he wanted to make a statement and asked me to come down and help them and I did.

Mr. Derryberry: That's all.

Cross-Examination

By Mr. Colloms:

Q. You know nothing at all about Mr. Mitchum's statement. How it was obtained or when it was obtained? A. No, sir.

Q. Or how many times he was talked to or anything at all about it? A. No, sir.

Mr. Colloms: That's all.

The Court: You may come down.

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MR. BILL GIBSON,

a witness for the State, was called and being duly sworn, was examined and testified as follows on

Direct Examination

By Attorney General Fisher:

Q. You are Bill Gibson, Sheriff of Bradley County? A. That's right.

Q. And you have been in office since September the **[182]** first of this year. Is that correct? A. That's right.

Q. And how long have you had the defendant Elliott in jail since his transfer from Chattanooga? A. From the time he was brought back after the hearing in Athens this past week and a half ago approximately.

Q. Do you recall the day he was brought back? A. I do not personally.

Q. Do you know how many days he went without taking insulin? A. Four.

Q. Four full days. A. Yes.

Q. Was this voluntary on his part? A. Yes, it was.

Q. His insistence? A. Yes, it was.

Q. How was he finally induced to take this insulin? A. I don't really know. I talked to him two or three times myself. I had a man in my employ who suffers also from a mild diabetic condition. He talked with him and his attorney came to the jail and also tried to persuade him unsuccessfully.

General Fisher: That's all.

[183] **Cross-Examination**

By Mr. Derryberry:

Q. Of course you don't know what the reason was that he wouldn't take it? A. I know what he told me.

Q. What did he tell you? A. He said he thought it was poison and he was afraid to take it.

Mr. Derryberry: That's all.

The Court: You may come down. Now, is there anything else?

General Fisher: No, your Honor.

The Court: Now, I understand that you gentlemen still want the right to introduce or file the statement of the doctor.

Mr. Derryberry: Yes, your Honor. I don't know if we have reached any agreement yet on the form or anything like that but——

The Court: Well, I will let you file his statement. Now, the court anticipates that the stateemnt will be that he is a diabetic and that he is required to take certain types of insulin and that if he doesn't probably the statement might contain, and you haven't seen it yet either.

Mr. Derryberry: No, your Honor.

The Court: That it will probably contain what **[184]** usually happens or what symptoms usually appear and I am well awre of that too. I am also aware of and take judicial knowledge of the fact that those symptons were not present with this man because I saw him on several occasions. I saw him the morning of the arraignment at which time I ordered that somebody go to Chattanooga and hurried up the process of getting his insulin. There were no symptons present on Saturday morning of any shock or anything of that nature. I will take knowledge of that.

Mr. Derryberry: Did I understand your Honor to say that you are taking judicial knowledge of that fact?

The Court: Well, I was present. I arraigned him. I talked to him personally as close as three feet away for some time.

Mr. Derryberry: May it please the Court, this is just one of the factors that we——

The Court: If you wish to cross-examine me, you might. I will let you.

Mr. Derryberry: I ain't that——

The Court: If you want to I will let you. I don't know why I couldn't take knowledge of that fact. I was with him at his request. If you want to cross- **[185]** examine me I will certainly let you.

Mr. Derryberry: He had had some dosage prior to that time, your Honor.

The Court: Well, if he had he told me a deliberate falsehood in my chambers. If he had he told a falsehood here on the witness stand also. All right. Gentlemen, on Monday, November the 27th, we will try William Johnson, Arnold Robarr, James W. Sharp and James Douglas Cline. The case numbers will be 5684-A and 5796. There will be a severance granted as to Jerry Wayne Mitchum and Otis Elliott in case number 5684-B. There will be one hundred extra jurors summoned for that occasion. That is Monday, November the 27th. Are there any questions? All the other jurors will be back that day also, four panels and the extras which I believe is six or seven, and there will be one hundred extra jurors summoned also for that day.

Mr. Colloms: Am I assuming correct then, your Honor, that Elliott and Mitchum will be tried at a later date?

The Court: Yes, Sir.

Mr. Derryberry: I have filed a motion for a severance, your Honor?

The Court: Well, I am granting your motion.

[186] Court will be in recess until nine o'clock in the morning.

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This Was All the Evidence and Proceedings Had at the Hearing of This Matter on November 28, 1972.

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Cleveland, Tennessee
March 20, 1973

Be It Remembered the above styled cause came on for hearing on this March the 20th, 1973, before the Honorable James C. Witt, Judge of the Cirminal Court, whereupon all parties being present as before named, the following proceedings were had, to-wit:

The Court: Now, I understand you have some motions you want to make. If you would tell me the nature of them——

Mr. Derryberry: All right, sir. We have filed a motion to suppress the items found under the house.

The Court: When did you file this motion?

Mr. Derryberry: I think that was filed a week or so ago, your Honor.

The Court: Well, gentlemen, I hear all those **[187]** motions prior to the trial. I didn't know you had filed them. I have no way in the world to sit and read these files. If you are going to file something and not tell me about it I don't know how in the world I am going to rule on it. This is the day set for trial. I can't hear those things today.

Mr. Derryberry: Please the Court, we did file them in the Criminal Court Clerk's Office and a copy was provided to the Attorney General.

The Court: Well, you didn't approach me for a hearing on the matter. It is a matter that will take proof I guess, won't it?

Mr. Derryberry: I believe it will, your Honor.

The Court: Well, I will have to overrule you. If these things are introduced and it appears that you are correct in it I will have to go back and correct it, but I can't stop now and have a hearing.

Mr. Derryberry: I am sorry, your Honor, but most of my practice is in Hamilton County and in that situation there it is just automatically docketed and it comes up on a normal docket, and in this case I didn't know when it would be——

The Court: I will do this, sir. I will read your motion after awhile, as soon as I get a chance and then before we swear the jury I will be in **[188]** shape to rule on it. You see, I have heard the evidence in this case and I will be in shape to rule

on it. I will give you a ruling prior to the swearing of the jury. Now, what else do you have?

Mr. Derryberry: We don't have with us, your Honor, a list of the jurors. I don't know if one is available in the clerk's office or not.

The Court: Well, it has been available since the first day of court. The complete list has laid over there on the defendant's table since the first day of court. Now, if it has got away in the last day or two we will prepare another one, but that is made available to all of the attorneys the first day of court. We will get you another list if it has gotten away. Mr. Colloms I guess has a list.

Mr. Derryberry: All right. And your Honor, we have requested a continuance in chambers and I understand that that will be overruled.

The Court: I understand you have done that in writing and set your grounds out. Mr. Colloms has he says.

Mr. Derryberry: We will join in that motion, please the Court.

The Court: I will respond to that in writing so **[189]** that it will be a matter of record.

Mr. Derryberry: All right. And in addition we have filed written motions for the transcript of the prior hearing in this matter and for the trial of the co-defendants, and I guess the Court will respond to that——

The Court: There are no transcripts at this time.

Mr. Derryberry: And please the Court, we have one other matter, and I am sorry, but we have filed a motion to allow the questioning of a witness, Mr. Bagwell, on our motion to suppress by deposition which the state did not agree to, and in this regard we are also submitting an affidavit of Doctor Quillian in Chattanooga and I don't know whether we have an

agreement that that be in the record or not. If not he has been subpoenaed.

General Fisher: No.

Mr. Derryberry: I beg your pardon.

General Fisher: No, there is no agreement of that to the record.

Mr. Derryberry: We also have Mr. Bagwell, who we wanted to question on written interrogatory and there was an objection to that, and as I understand it Mr. Fisher wanted him to be present in court if——

[190] The Court: Do you have him as a witness?

Mr. Derryberry: We filed a motion to allow——

The Court: Well, you don't have to tell me. You just summons him and there he stands, tell him he is——

Mr Derryberry: He is here, your Honor, and I think this is a matter that goes to our motion to suppress of which there was an earlier hearing and the state would not agree to the questioning of this witness on written questions. We filed a motion in this regard, and so he is here and able to testify but I believe that should be out of the presence of the jury.

The Court: On a motion to suppress?

Mr. Derryberry: Yes, your Honor.

The Court: All right. I will hear him. Of course he is an advocate in this whole procedure.

Mr. Derryberry: Not in this matter, your Honor.

The Court: Well, yes, as far as the admissibility of what you are talking about he is an advocate.

Mr. Derryberry: Well, he is a witness with personal knowledge of these things and——

The Court: All right. We will let him testify.

Mr. Derryberry: Could that be out of the presence of the jury?

[191] The Court: Yes, after we pick the jury. I will hear you after that. Do you have that file? Let's start picking a jury and get started.

* * * * * * *

The Jury was selected, and prior to the reading of the indictment and swearing of the jury, the jury was sent to the jury room and the following took place in the absence of the jury:

The Court: Now, the court understands that the defense counsel is desiring to make further motions concerning the motion to suppress. Now, I have heard a lot of proof on this. I have heard it in McMinn County and I have heard it here I think. I have heard it just about all the way across East Tennessee I think. I am not going to hear anymore, Gentlemen. I have heard all this, and we have set two days for it, and we have heard proof about this alleged confession and I am not going to hear anymore. You say you want a doctor to testify. Well, he isn't here.

Mr. Derryberry: Please the Court, at the last hearing we had here in Bradley County the doctor was subpoenaed and he failed to appear because as **[192]** we understand some kind of emergency surgery he had scheduled. As a result of that failure to appear I submitted to the court an affidavit which is in the court file which was by Doctor Jesse Quillian of Chattanooga, who is Mr. Elliott's physician. This was in regard to his condition as a diabetic and as to the effect in general of being deprived of insulin and as to the effect of that coupled with——

The Court: Now, I will take judicial knowledge of the fact that this doctor said and will say that Mr. Elliott. was a diabetic. I will also take judicial knowledge of the fact that people who are diabetics, if they are deprived of insulin long enough will go in shock, but I also take judicial knowledge of the fact that the day that Mr. Elliott came to me in my chambers and I called

the doctor and I got the information and I sent for the insulin that there was nothing wrong with him. He was just as bright and intelligent as you are. Now, I will take judicial knowledge of that also. Now, Gentlemen, you are overruled. We are not going to chew this bone any longer. I have been involved in this for two days already prior to this trial. I am going to overrule you.

Mr. Derryberry: I understand the court is **[193]** taking judicial knowledge or notice of the fact that the defendant was clear headed and being deprived of insulin was not a factor.

The Court: On the day that I called his doctor he came to me in chambers and asked, he told me that he was a diabetic and he needed his medicine, his insulin. I called the doctor, the same doctor you are talking about. He said that is true, according to my records he is a diabetic. I sent the officers that day and they got the insulin and got it that day. Now, two or three days later, sometime later, he refused to take it I recall but I am not going to get involved in that. It is already in the record, Gentlemen.

Mr. Derryberry: Well, please the Court, we did subpoena Doctor Quillian and——

The Court: Well, he isn't here.

Mr. Derryberry: He can be here in thirty minutes, your Honor.

The Court: I am not going to hear anymore. I told you I would take judicial knowledge of the fact of what he says and that is what you have got in your affidavit.

Mr. Derryberry: All right. We most respectively except, your Honor.

[194] The Court: All right.

Mr. Derryberry: Also I would indicate that Mr. Bagwell was here this morning and was prepared to testify on this matter.

He observed the defendant Elliott in the Bradley County jail during the period he was there, and we also filed a motion, as I stated earlier, to allow his questioning upon a written deposition.

The Court: There is no law in criminal law for depositions unless both sides agree to it. They do not agree to it and there is no use in us talking about that.

Mr. Derryberry: All right, sir. Then we would offer and ask to put on Mr. Bagwell——

The Court: Now, gentlemen, I told you I have already heard this for two full days, not full days, but two days. I assigned the days for this purpose. You could have had anybody you wanted. I listened to every witness you put on and you had all the opportunity you needed and the Court doesn't feel like to use another attorney, who is an advocate in this same trial but it just so happens he represents another defendant——

Mr. Derryberry: Yes, your Honor, and that trial is completed.

[195] The Court: That's right. I don't think he is a proper fellow to use as a witness.

Mr. Derryberry: We didn't know about it, your Honor. He came after the hearing and volunteered to us the information that he had seen.

General Fisher: As I recall he was at the hearing in Athens, wasn't he?

The Court: I think that is right.

Mr. Derryberry: He didn't indicate to us until after the hearing here in Bradley County.

The Court: I think he was present at one of the hearings or maybe both of them.

Mr. Derryberry: Maybe he was, your Honor, but we didn't know and he didn't tell us until after——

The Court: Well, it seems a strange thing to me that you would have to use an attorney to prove something that is an attorney in the same case.

Mr. Derryberry: It is irregular, Judge. He just happened to see him and was an eye witness there and for that reason we would ask to be able to put him on.

General Fisher: As I recall I believe he was at both hearings on this same previous motion, please the Court, and he didn't speak up at that time.

The Court: Well, I have already heard the **[196]** matter anyway, gentlemen, and I think I have given you a full hearing in the matter and I am not going to hear it. We are not faced with the trial of the case and we are going to have to try it and we are going to have to get on with it. So I will overrule you.

Mr. Derryberry: All right. We respectively except, sir.

The Court: All right. Now, will——

Mr. Derryberry: I should say, your Honor, that we would offer to prove by Mr. Bagwell that he observed the defendant in the jail and he was in a poor physical condition at that time. I just make that offer.

The Court: All right. Call the jury back in, please. Gentlemen, call your witnesses up so that we can see who they are and put them out under the rule.

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